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IN THE

# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1973

NO. 73-503

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GEORGE RAMSEY; LEON NUNLEY, d/b/a LEON NUNLEY COAL COMPANY; PAUL GIBBS, d/b/a PAUL GIBBS COAL COMPANY; LOIS HALL TRAVIS, Administratrix of the Estate of W. J. Travis, and EDNA GRAHAM, Executrix of the Estate of J. H. Graham, d/b/a NINTH WEST COAL COMPANY; A. & R. COAL COMPANY, INC.; W. T. MORRISON and EDNA GRAHAM, Executrix of the Estate of J. H. Graham, d/b/a M & G COAL COMPANY; J. H. GRAHAM COAL COMPANY, INC.; W. T. MORRISON and LOIS HALL TRAVIS, Administratrix of the Estate of W. J. Travis, d/b/a M & T COAL COMPANY; STEPHENSON BROTHERS COAL COMPANY, INC.; EDWARD NUNLEY, d/b/a EDWARD NUNLEY COAL COMPANY; EAST VALLEY COAL COMPANY, INC.; ELLIS WARD and LON L. VARNELL, d/b/a TRACY CITY COAL COMPANY; HENRY WILLIS FLYNN, d/b/a WILLIS FLYNN COAL COMPANY; H. W. FLYNN COAL COMPANY, INC.; HALLIE HIGGINS, Administratrix of the Estate of Howard Higgins, d/b/a HOWARD HIGGINS COAL COMPANY; HOWARD HIGGINS COAL COMPANY, INC.; TENNESSEE PRODUCTS AND CHEMICAL CORPORATION,

Petitioners,

v.

UNITED MINE WORKERS OF AMERICA,

Defendant.

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# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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[Counsel listed inside cover.]

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**Petitioners,**

v.

UNITED MINE WORKERS OF AMERICA,

**Defendant.**

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# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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**To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:**

Petitioners pray that a Writ of Certiorari issue to review the judgments of the United States Court of Appeals for the Sixth Circuit entered June 19, 1973, with Petition to Rehear denied August 20, 1973, in identical cases No. 72-1926 and No. 72-1927, styled respectively George Ramsey; Leon Nunley, d/b/a Leon Nunley Coal Company; Paul Gibbs, d/b/a Paul Gibbs Coal Company; Lois Hall Travis, Administratrix of the Estate of W. J. Travis, and Edna Graham, Executrix of the Estate of J. H. Graham, d/b/a Ninth West Coal Company; A. & R. Coal Company, Inc.; W. T. Morrison and Edna Graham, Executrix of the Estate of J. H. Graham, d/b/a M & G Coal Company; J. H. Graham Coal Company, Inc.; W. T. Morrison and Lois Hall Travis, Administratrix of the Estate of W. J. Travis, d/b/a M & T Coal Company, Stephenson Brothers Coal Company, Inc.; Edward Nunley, d/b/a Edward Nunley Coal Company; East Valley Coal Company, Inc.; Ellis Ward and Lon L. Varnell, d/b/a Tracy City Coal Company; Henry Willis Flynn d/b/a Willis Flynn Coal Company; H. W. Flynn Coal Company, Inc.; Hallie Higgins, Administratrix of the Estate of Howard Higgins, d/b/a Howard Higgins Coal Company; Howard Higgins Coal Company, Inc., Plaintiffs-Appellants, v. United Mine Workers of America (herein called "UMW") Defendant-Appellee, and Tennessee Products and Chemical Corporation, Plaintiffs-Appellant, v. United Mine Workers of America, Defendant-Appellee, wherein the Sixth Circuit affirmed judgments of the United States District Court for the Eastern District of Tennessee, Southern Division entered June 29, 1972, against petitioners and in UMW's favor, dismissing the complaints filed in these cases.

A certified record in said cases, including proceedings in both the District Court and Court of Appeals since the decision and remand of these cases (401 U.S. 302), is furnished herewith, in accordance with this Court's rules.

## OPINIONS BELOW

The opinion of the District Court before the mandate of the Supreme Court is found in 265 F. Supp. 388; the first opinion of the Court of Appeals before the mandate of the Supreme Court, being a split decision of the full Court, is found in 416 F.2d 655; after the decision and remand of these cases by the Supreme Court in 401 U.S. 302, the District Court again dismissed the complaints in a decision contained in Appendix B hereto the same appearing in 344 F. Supp. 1029; and the opinion of the Court of Appeals on the second appeal is contained in Appendix A hereto and is contained in ... F.2d ....

## JURISDICTION

The judgment of the Court of Appeals affirming the Trial Court's judgment was entered June 19, 1973 and the Court overruled Petition to Rehear on August 20, 1973. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1) and 2101(c).

## 'BASIS FOR FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT

These suits were instituted to recover damages under the Sherman and Clayton Acts and jurisdiction of the District Court was based on 15 U.S.C. §15.

## QUESTIONS PRESENTED

1. Did the lower Courts commit reversible error in misconstruing and rejecting instructions contained in the Mandate of the Supreme Court in these cases in the following respects:

A. With respect to the existence of implicit restrictive agreement beyond the express language of the Protective Wage Clause of the 1958 National Contract, and also with respect to the meaning of the express restraint contained in that clause, were the lower Courts in error in construing the mandate of the Supreme Court to require consideration in the remanded proceedings of only the original record and to require exclusion of proof discovered after the first trial which new proof was in the form of minutes of major coal associations and industry committees made at the time of the making and enforcement of the Protective Wage Clause which showed the pressing of the Protective Wage Clause upon the Union and the purpose behind the pressure by the major coal associations was to restrict "non-union" and "non-contract" coal in the market so as to raise prices, and

B. With respect to the express written restraint contained in the Protective Wage Clause were the lower Courts in error in rejecting the instruction contained in the Supreme Court's mandate that plaintiff employers could have Sherman Act relief even if they were signatories to the National Contract where the Union, as required by the terms negotiated with dominate coal company associations, insisted on maintaining in other signatory units for the life of the Protective Wage Clause specified wage standards ruinous to the business of the plaintiff employers, the lower Courts reasoning that

any plaintiff who had signed the National Contract should be barred from recovery, apparently under the concept of *in pari delicto* ?

2. Under the remand from the Supreme Court, was it within the Trial Court's discretion, and should the "clearly erroneous" rule be applied on appeal, when the Trial Court reverses its previous finding of implicit illegal agreement based on preponderance of evidence, while the Trial Court at the same time rejects (as cumulative evidence barred by the Supreme Court's Mandate) new proof of association and committee minutes that strongly supports the original finding, the Trial Court not discussing and making no finding in either of its opinions about the nature of such evidence which showed the pressure and expressed anticompetitive purposes of major associations in getting the Union to sign the Protective Wage Clause?

## STATUTES INVOLVED

The statutory provisions involved are §§ 1 and 2 of the Sherman Act (15 U.S.C. §, 2); §§4 and 6 of the Clayton Act (15 U.S.C. 15, 17); §20 of the Clayton Act (29 U.S.C. 52); §§2, 4 and 6 of the Norris-Laguardia Act (29 U.S.C. 102, 104 and 106); the Labor-Management Relations Act (29 U.S.C. 141, 151, 157 and 158(b) and (e).

## STATEMENT OF THE CASE

### A. HISTORY OF THE CASE BEFORE THE DECISION OF THIS COURT HEREIN.

This is the second appeal in these two cases, which were tried without a jury on the same record. After the District Court dismissed the complaints and the Court of Appeals had sustained that action by a four to four split on a hearing en banc on the first appeal, this Court granted

Writ of Certiorari and after argument reversed and remanded with instructions. 401 U.S. 302.

Plaintiffs-Appellants in the *Ramsey* Case were small coal mining companies who operated in Southeastern Tennessee. They joined as plaintiffs in filing the case against United Mine Workers of America (UMW) on January 6, 1961 (App. p. 1a). The suit was brought for damages under §1 and §2 of the Sherman Act under the allegations that UMW conspired with major coal producers to put smaller companies out of business.

On January 6, 1965 pursuant to permission granted by the Court, plaintiff-appellants filed a supplemental complaint bringing the later years through 1964 into the damage period covered by the case (App. p. 4a). The case was tried by the Court without a jury in Chattanooga in the Fall of 1965, and the Court took the case under advisement.

Another coal producer in the Southeastern Tennessee field had filed a separate case against UMW with the same theory as the *Ramsey* Case in the same Court, this being Tennessee Products and Chemical Corporation. On December 5, 1966 by an agreed order, the *Tennessee Products* Case was submitted to the Court for adjudication on the issue of liability upon the trial record made in the *Ramsey* Case.

The District Court filed its opinion containing findings of fact and conclusions of law on March 4, 1967 (265 F. Supp. 388). The opinion and the final judgment dismissed both cases and the final judgment was entered March 9, 1967. All plaintiffs appealed to the Court of Appeals for the Sixth Circuit on the first appeal.

The evidence in the case dealt mainly with the use of the National Bituminous Coal Wage Agreement to suppress

the smaller companies pursuant to agreement between the Union and the major coal associations, a principal question being whether UMW's bargaining freedom was curtailed by agreement in violation of the Sherman Act.

An important part of the case on the first trial and on the first appeal and by far the most important part of the case since the remand by this Court, dealt with the Protective Wage Clause (PWC) which was added to the National Bituminous Coal Wage Agreement in 1958 by UMW by agreement with the major coal associations. The Introductory Paragraph and Paragraph A of that Clause read as follows:

> "The United Mine Workers of America (which, as used in this Clause, includes all of its Districts, Local Unions, Officers or Agents) and the Operators signatory hereto affirm their intention to maintain the integrity of this contract in all of its parts. The objective of this contract is to provide the maximum possible continuity and stability of employment under the conditions set forth herein. The parties hereto agree that bituminous coal mines shall be so operated as not to debase or lower the standards of wages, hours, safety requirements and other conditions of work, established by this contract. The parties recognizing their obligation each as to the other to exercise all possible efforts and means to attain these objectives further agree as follows.
>
> "A. During the period of this contract, the United Mine Workers of America will not enter into, be a party to, nor will it permit any agreement or understanding covering any wages, hours or other conditions of work applicable to employees covered by this contract on any basis other than those specified in this contract or any

applicable District Contract. The United Mine Workers of America will diligently perform and enforce without discrimination or favor the conditions of this paragraph and all other terms and conditions of this Contract and will use and exercise its continuing best efforts to obtain full compliance therewith by each and all the parties signatory thereto" (App. p. 32a-33a).

These provisions were followed by a provision for a boycott of coal of non-complying producers in Paragraph B and by later paragraphs that established a tribunal to police the carrying out of the clause and to conduct investigations and trials with respect to violations either on the side of the union or the operators (App. p. 33a-38a).

The *first question on the first appeal* dealt with the "Clear-Proof Rule" of the Norris-Laguardia Act (29 U.S.C. 106). The District Court held that this rule applied to the question of proving conspiracy and all issues in the case, and under this view the District Court held that there was not such clear-proof as to support the allegations of the Complaint. However, he found that *on the preponderance of evidence* there was an implicit agreement between UMW and major coal company associations which violated the Sherman Act in that UMW on the preponderance of evidence had agreed with major company representatives it would contract only on national contract terms with all producers (265 F. Supp. 412). The District Court also stated that if the "Clear-Proof Rule" did not apply the Court might have reached different conclusions on other issues (265 F. Supp. 434).

A three judge panel of the Court of Appeals ruled that the Trial Court had erred in applying the Clear-Proof standard but rehearing en banc in that Court was granted. Four judges agreed with the Trial Judge, and four disagreed

upon the question of whether the Clear-Proof Rule applied to the issue of conspiracy and all other issues. Upon the even division of the Court of Appeals the judgment of the District Court was reinstated (416 F.2d 655).

The *second question on the first appeal* dealt with the express language which restrained UMW in its bargaining for the duration of the PWC. This involves the construction of Paragraph A contended for by UMW at the first trial and which construction the District Court adopted when it rendered its decision some several months after the trial. The District Court held that UMW was correct in saying the clause was ambiguous and that it could be construed to limit UMW in its bargaining freedom only with respect to units which had become signatories to the National Contract rather than limiting UMW in its freedom to bargain with all the units of the industry. The Court said that this would make the clause legal and the clause must be construed in such a way to make it legal if that were possible (265 F. Supp. 411-412).

Under their second question on the first appeal, petitioners contended that even under the construction of the PWC adopted by the Trial Court the clause still violated the Sherman Act when it was applied to signatory units such as the petitioners where the actual and proved result was the ruination of their business. Petitioners contended that (even under the Court's construction) PWC prevented UMW from making any change in the terms of the 1958 Contract with respect to the petitioners (who had signed the 1958 Contract before they later tried to get out from under it) because of the PWC restraints expressly imposed upon UMW as shown in the language quoted above (even if limited to signatory units) which language was originally signed with major coal company associations. Once the associations got UMW to agree to this language UMW could

not be expected to be released from those restraints simply because petitioners had to make some changes in order to survive. Petitioners contended this restraint interfered with the freedom of action of the hundreds of supposedly independent signatory units and this should make the agreement illegal even under UMW's construction adopted by the Trial Court when over the long life of PWC it was destructive of such units as these petitioners.

B. THE DECISION AND MANDATE OF THE SUPREME COURT.

The Supreme Court granted certiorari and a majority opinion written by Justice White (401 U.S. 302) *with respect to the first question* held that the "Clear-Proof" standard applied only to a Union's authorization of, participation in, or ratification of the acts allegedly performed on its behalf, and that otherwise the usual preponderance of evidence rule applies in treble damage antitrust suits against labor unions. Thus the Supreme Court ruled that the lower Courts were in error on application of the "Clear-Proof" standard.

*With respect to the second question* regarding the express restraint contained in the Protective Wage Clause on the bargaining freedom of UMW, even if the restraint were limited to signatory units for the life of PWC, the opinion of Justice White held that the factual basis for application of this contention to the plaintiffs should not be dealt with as a matter of first impression in the Supreme Court and the Court could not determine that the lower Courts had looked at the facts in light of this contention (401 U.S. at 312).

However, with respect to the rule that should govern this contention of the petitioners, the concluding language

of Justice White's opinion for the majority in the Supreme Court said:

> "Where a union, by agreement with one set of employers, insists on *maintaining* in other bargaining units specified wage standards ruinous to the business of those employers, it is liable under the antitrust laws for the damages caused by its agreed upon conduct." (401 U.S. at 313) (Emphasis supplied)

Petitioners considered that this means UMW violates the Sherman Act if it "maintains" in any supposedly independent signatory unit (such as these plaintiffs) wage terms destructive to that unit by agreement with another set of employers or associations of employers. The Sherman Act is violated not only by agreements with one set of employers to put other employer units under the National Contract for the first time, but also by agreements to "maintain" those contract terms in units already under the terms when such is damaging or destructive to those units.

The Supreme Court's mandate required further proceedings consistent with the majority opinion of the Supreme Court.

### C. THE DECISION OF THE TRIAL COURT AFTER THE REMAND.

After the mandate from the Supreme Court and the Court of Appeals, in a conference in chambers the District Court indicated it would simply take the record and, with briefs from each side, the Court would re-evaluate the old record under the Supreme Court's standards.

Thereupon, the plaintiffs filed a motion to open the record for additional evidence on the issue of liability and

requesting the setting of time for the production and filing of such evidence (App. p. 19a-21a and 183a).

The motion to open the record had attached to it documentary evidence which had been produced in a later similar case, which evidence plaintiffs offered to give conclusive proof that there was an implicit deal made by UMW such as had been found on the preponderance of evidence in the Court's previous findings, but also and more particularly to prove the circumstances and intentions of the parties in writing the PWC in the National Contract in 1958, and the practical construction given that clause by the individuals who drafted it in their activities as members of the Joint Industry Contract Committee (JICC) which policed the PWC. This evidence was largely in the form of the minutes of coal associations and industry committees which sponsored the PWC and also the deposition of the head of one of the coal associations who was the prime mover in bringing PWC into being (App. p. 22a-179a).

This evidence is in the present appendix from the Court of Appeals, and there is a summary of this evidence in Appendix C, post. It clearly shows that the major coal associations pressed the PWC upon the Union for the express purpose of restricting non-union and non-contract coal in the markets so as to raise prices.

Without setting the matter for a hearing, the District Court filed an opinion and judgment on June 30, 1972 overruling the motion to open the record and again dismissing the complaints (App. p. 184a-205a).

With respect to the matter involved in the first question on appeal, the District Court reversed its former holding that on the preponderance of evidence an implicit illegal agreement had been made and proceeded to find that on the preponderance of evidence the proof failed to support

the allegations made in the complaint. (344 F. Supp. 1029 at 1037-9).

With respect to the second question on the first appeal, the District Court held that there was nothing to the contention that PWC was invalid when it was applied to signatory operators, this being the second question dealt with in the Supreme Court's Opinion (344 F. Supp. 1029 at 1034 under headnote 2, particularly the last sentence thereof). The District Court's ruling on this was not clear to the petitioners. Accordingly petitioners filed a motion under Rule 52(b), Federal Rules of Civil Procedure, to amend and clarify the findings of fact and conclusions with respect to this contention pointing out again that this contention had been dealt with by the Supreme Court, this motion being filed July 6, 1972 (App. p. 206a-209a). On July 31, 1972 the District Court entered an order denying the motion to clarify and the petitioners duly filed their notice of appeal on August 8, 1972.

D. THE DECISION OF THE COURT OF APPEALS.

On the second appeal the three judge panel of the Court of Appeals split two to one in favor of sustaining the action of the Trial Court after the mandate. The opinion of the majority principally quotes at length from the Trial Court's Opinion and applied the "clearly erroneous" rule.

The dissenting opinion of Judge Weick rather vividly and forcefully deals with the many "grievous errors" contained in the Trial Court's Opinion and in the opinion of the majority of the Court of Appeals. Many of these comments will be referred to below in the argument.

## REASONS FOR GRANTING THE WRIT

### I

### THE LOWER COURTS HAVE MISCONSTRUED AND REJECTED INSTRUCTIONS CONTAINED IN THE MANDATE OF THE SUPREME COURT.

A. WITH RESPECT TO THE EXISTENCE OF IMPLICIT AGREEMENT BEYOND THE EXPRESS LANGUAGE OF THE PROTECTIVE WAGE CLAUSE, AND ALSO WITH RESPECT TO THE MEANING OF THE EXPRESS RESTRAINT CONTAINED IN THAT CLAUSE, THE LOWER COURTS COMMITTED REVERSIBLE ERROR IN CONSTRUING THE MANDATE OF THE SUPREME COURT TO REQUIRE CONSIDERATION IN THE REMANDED PROCEEDINGS OF ONLY THE ORIGINAL RECORD AND TO REQUIRE EXCLUSION OF PROOF DISCOVERED AFTER THE FIRST TRIAL WHICH NEW PROOF WAS IN THE FORM OF MINUTES OF MAJOR COAL ASSOCIATIONS AND INDUSTRY COMMITTEES MADE AT THE TIME OF THE MAKING AND ENFORCEMENT OF PWC WHICH PROOF SHOWED THE PURPOSE BEHIND THE PRESSING OF PWC UPON THE UNION BY MAJOR COAL ASSOCIATIONS WAS TO RESTRICT NON-UNION AND NON-CONTRACT COAL IN THE MARKET SO AS TO RAISE PRICES.

The opinion of Justice White for the majority of the Court pointed out the finding by the District Court after the first trial with respect to an implied conspiracy to standardize employment terms throughout the industry aimed at destroying marginal producers, quoting the language of the Trial Court that "were this case being tried upon the usual preponderance of the evidence rule applicable to civil cases, the Court would conclude that the UMW did so impliedly agree."

This Court held that the preponderance rule should apply to this question and accordingly the District Court was in error in dismissing the complaint.

The first appeal also dealt with the question of the meaning of the express restraint contained in PWC, the lower Courts holding the Clause was ambiguous and, since it could be construed to be limited in restricting UMW's bargaining freedom to signatory units, the Clause must be given that meaning which would make it legal, according to the lower Courts. Whether or not that limited restraint would be legal was the second question dealt with by the Supreme Court. But, beyond this question was the question of the correct construction of the supposedly ambiguous PWC. Of course the normal rule of construction is that the surrounding circumstances and practical construction by the parties is given great weight.

Upon the remand the Trial Court indicated in conference that it would simply take the old record and review it. Petitioners filed their motion for opening the record so as to admit new evidence and attached to the motion documentary evidence, the nature of which is shown in Appendix C, post. This evidence, in the form of the minutes of coal associations and industry committees, and testimony about those minutes, plainly shows that the major coal associations pressured the Union into adopting PWC and the reason was anticompetitive purposes to get the non-union and non-contract coal out of the market so as to raise prices.

As Judge Weick pointed out in his dissenting opinion in the Court of Appeals the purpose of this offer of evidence was to give conclusive proof that there was an implicit agreement made by UMW such as had been found by the District Court previously based on preponderance of evidence and also, and more particularly, to prove the cir-

cumstances and intentions of the parties in writing PWC in the contract in 1958 and the practical construction given that Clause by the parties who drafted it in their activities as members of the Joint Industry Contract Committee which policed the PWC.

In deciding the case the District Court overruled the motion to open the record to admit this evidence. His reason for doing this is stated:

> "In view of the very extensive trial upon the issues, the substantially cumulative nature of the newly tendered proof, *and the direction upon remand in this case*, the Court is of the opinion that the motion to reopen the proof should be denied." (344 F. Supp. 1029 at 1038) (Emphasis supplied)

That the record which the Court had to review was already long, and that the offer of evidence was cumulative are simply not sound reasons for rejecting this evidence because of the matters stated below with respect to the nextquestion raised in this petition. The length of record and cumulativeness of proof about the central issues in the case are simply not justification for denying this evidence, when the only task the Court recognized it had was to see which side had accumulated the most evidence of the very kind under consideration, and when, in this process, the Court reversed its own previous finding which this evidence substantiated.

Accordingly the most important reason assigned by the Trial Court was that the Supreme Court's mandate required exclusion of the evidence.

This was the view of the majority opinion of the Court of Appeals. That opinion says:

> "We believe that it was the purpose of the Supreme Court Remand to have the Trial Court review the original trial record on the standard of proof which the Supreme Court had declared to be the proper and legal one. There is not a line in Justice White's Opinion which contains a suggestion that the record should be reopened on Remand for the taking of additional evidence. We have no doubt that this fact strongly motivated the view on this issue taken by the District Judge, as it does us."

Judge Weick in his dissenting opinion considered this a most important and glaring error and the first part of his opinion is a good discussion of how untenable this construction of the Supreme Court's mandate was.

We submit that Judge Weick is correct about this. We do not believe this Court meant to restrict the consideration of the Trial Court in arriving at justice in these cases to such an extent that conclusions would be reached completely contrary to the actual facts known in 1971 but which were known only to the alleged conspirators back in 1965 at the time of the first trial. There certainly would be no justice or ultimate rightness in such an arbitrary rule. It would merely artificially constrict the factual basis for determining right and wrong without sound reason and put a premium on concealment of facts by conspirators. It is to be remembered that not just the plaintiffs but also the public has an interest in antitrust cases and the treble damage case is favored as an aid in the protection of the public.

If this had been a jury trial the remand would necessarily mean the offered new evidence would have been admissible on the new trial. Justice is not served when the same facts are available for one who seeks a jury but not for one who waives a jury.

The Trial Court has made absolutely no findings in either of its opinions about the pressure being applied to the Union by the major coal company associations to restrict the Union's bargaining freedom so as to keep non-contract and non-union coal out of the markets in order to raise prices. In addition, the Trial Court has made absolutely no findings of fact about the circumstances surrounding the making of PWC or the practical construction by the parties who wrote PWC, but has simply applied a secondary rule of construction that an agreement must be construed as legal if it can have that meaning. (265 F. Supp. 388 at 412, and 344 F. Supp. 1029 at 1033-4).

In spite of these omissions in the findings and conclusions of the Court the Court has rejected documentary evidence of the utmost reliability which bears heavily upon these central issues. There is no evidence like it in the old record as indicated by the absence of any findings.

We do not believe that this Court meant to restrict the record which the lower Court would consider in determining the issues in this case as claimed by the lower Courts.

B. WITH RESPECT TO THE EXPRESS WRITTEN RESTRAINT CONTAINED IN THE PROTECTIVE WAGE CLAUSE THE LOWER COURTS WERE IN ERROR IN REJECTING THE INSTRUCTION CONTAINED IN THE SUPREME COURT'S REMAND THAT PLAINTIFF EMPLOYERS COULD HAVE SHERMAN ACT RELIEF EVEN IF THEY WERE SIGNATORIES TO THE NATIONAL CONTRACT WHERE THE UNION, AS REQUIRED BY THE TERMS NEGOTIATED WITH DOMINATE COAL COMPANY ASSOCIATIONS, INSISTS ON MAINTAINING IN OTHER SIGNATORY UNITS FOR THE LIFE OF THE PWC SPECIFIED WAGE STANDARDS RUINOUS TO THE BUSINESS OF THE PLAINTIFF EMPLOYERS, THE

LOWER COURTS REASONING THAT SIGNATORY UNITS WERE IN PARI DELICTO.

The second question dealt with by this Court on the first appeal concerned the contention of petitioners that even if the PWC meant what the UMW contended and what the Trial Court found, and even if it bound the Union only to insist on identical contract terms as against "signatories", the Clause was still illegal because the Union would no longer have freedom to agree to different terms with any such signatory for the life of the Protective Wage Clause made with the major coal associations. This Court held that it was inappropriate for the Supreme Court to delve into the record in order to resolve the factual basis for application of this contention to the plaintiffs in the first instance.

However, the concluding language of Mr. Justice White's Opinion for the majority of the Court would have specific reference to this situation when the Court says:

> "Where a union, by agreement with one set of employers, insists on *maintaining* in other bargaining units specified wage standards ruinous to the business of those employers, it is liable under the antitrust laws for the damages caused by its agreed upon conduct." (401 U.S. 313) (Emphasis supplied).

This language means to the petitioners that the Union does violate the antitrust law by agreeing with one set of employers to "maintain", for the life of PWC, in units such as these petitioners (who had signed the National Contract) wage standards which proved to be ruinous. The Protective Wage Clause actually went on for several years in the National Contract after these petitioners tried to get out from under the National Contract terms. The coal field was literally destroyed and turned into a "blighted area" in this effort as found by the Trial Court (265 F.

Supp. 388 at 427-430) before the PWC was taken out of the National Contract.

The remand by this Court was to have further proceedings consistent with this opinion of the majority of the Court. This necessarily means that the lower Court must determine if UMW was "maintaining" terms in the plaintiff units destructive to those units by agreement with the major coal associations. This is exactly what the PWC required of the Union as construed by the UMW itself and by the District Court becausethese units were "signatories." The District Court repeats that construction again, referring to its first opinion and saying:

> "The conclusion was there reached that the PWC was limited to signatories only and did not commit or limit the Union in bargaining with non-signatory coal operators." (344 F. Supp. 1029 at 1034).

The Trial Court's Opinion on the remand shoved this major contention of the petitioners into the background and the answer given was extremely hazy. The District Court stated with respect to this (344 F. Supp. 1029 at 1034):

> "The difficulty with this position is the same as with the plaintiff's previously stated position, and that is that the PWC refers neither to future or previous signatories, but rather refers to 'signatory operators' and to 'employees covered by this contract'".

With respect to this statement by the Court, whatever its point may be, it is to be noted that the sentence of Paragraph A of PWC under consideration which is quoted above in the statement of the case actually says *nothing* about "signatory operators." It was the contention of UMW and the decision of the Trial Court that the sentence could be construed to be limited to signatory operators.

Then the District Court added (344 F. Supp. 1029 at 1034):

> "It may likewise be noted that the plaintiffs' contention that the PWC constituted an express commitment in violation of the antitrust law would appear to be partially self-defeating in that most, if not all, of the plaintiffs were themselves parties to that agreement until December of 1962."

With respect to this latter statement of the Court it is to be noted that December, 1962 is when the Southern Tennessee field sought to get out from under the National Contract and the long fierce destructive strike commenced which the District Court said in its previous opinion rendered the three county field a "blighted area."

It is difficult to fathom the Court's position from the foregoing quotations, and accordingly the plaintiffs requested the Court by motion to clarify its holding in this regard, pointing out that this was the second question dealt with in the Supreme Court's Opinion and that it should be answered fully in the District Court because it was a question that should not be handled by an appellate court as a matter of first impression. However, this motion to clarify was denied by the District Court (App. p. 206a-209a).

The Court of Appeals majority opinion merely quotes the language from the District Court's opinion about this contention and says "we agree."

Judge Weick in his dissenting opinion, we believe, has the right answer concerning this holding by the District Court when he says:

> "The District Court stated that plaintiff's contention that PWC constituted an express commitment in violation

of the antitrust law was 'self-defeating', apparently on the theory that plaintiffs were signatory thereto and would be in pari delicto. Taking into account the acts of the Union which compelled plaintiffs and other operators to sign, and the efforts of plaintiffs to get out from under the contract, this defense does not hold water. UMW did not raise this defense and it was not considered in the prior appeal in this Court, nor in the Supreme Court. We do not know why the District Court raised it. It would seem to be against public policy to permit such a defense in this type of action. (Citing *South-East Coal Company v. Consolidated Coal Company*, 434 F.2d 767, 783-784 (Sixth Circuit, 1970).")

We submit Judge Weick is unquestionably correct in the above statement. It is settled by this Court that in anti-trust cases in pari delicto has no place as a defense in a situation like this. See *Perma-Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134.

It is to be remembered that the District Court had found in its first opinion after the first trial:

"(1) To operate successfully the producers in the Southeastern Tennessee coal field must be able to compete and survive on TVA coal market. Since 1954 50% or more of all coal produced in the State of Tennessee has had to find its market with the TVA. That figure reached as high as 78% in 1956 and 1962 was still at 64.3%.

"(2) Due to the geological conditions, the Southeastern Tennessee coal field cannot achieve a level of productivity equivalent to that of its principal competitors on the TVA coal market. This competitive disadvantage is offset in part by the transportation and quality advantages which the field has over its principal

competitors in the TVA market at the Widow's Creek steam plant.

"(3) In the period since 1960 the coal operators in the Southeastern Tennessee coal field have been unable to compete and survive in the TVA coal market under the National Bituminous Coal Wage Agreement. While in many instances this appears to have been due to antiquated mining methods and equipment or other causes, the fact nevertheless remains that since 1960 there has not been a single instance of a successful coal mining operation in the Southeastern Tennessee coal field under the National Bituminous Coal Wage Agreement and this in spite of the fact that the only feasible alternative facing most coal operators in the area was to operate under the national contract or go out of business." (265 F. Supp. 430)

We believe that Judge Weick gives a vigorous rejection of the whole roundabout method used by the lower Courts in getting around the PWC when he states:

"The District Court stated in more than one place that there was no *direct* evidence of a conspiracy. It is submitted that this is true in most conspiracy cases. The conspiracy, ordinarily, must be shown by circumstantial evidence. The present case, however, comes as close as any case we have ever read, as establishing an express agreement.

"The Protective Wage Clause provides in Paragraph 'A' of the agreement of UMW, as follows:

"'A. During the period of this Contract, the United Mine Workers of America will not enter into, be a party to, nor will it permit any agreement or understanding covering any wages, hours or other

conditions of work applicable to employees covered by this Contract on any basis other than those specified in this Contract or any applicable District Contract. The United Mine Workers of America will diligently perform and enforce without discrimination or favor the conditions of this paragraph and all other terms and conditions of this Contract and will use and exercise its continuing best efforts to obtain full compliance therewith by each and all the parties signatory thereto.'

"BCOA requested this paragraph. 265 F. Supp. 410.

"If this language means anything, it is clear that UMW has bound itself not to enter into any agreement and not to be a party to any agreement or understanding covering wages, hours and working conditions on any basis other than as specified in this contract.

"In Paragraph 'B' of PWC the signatory operators agree to boycott coal not produced in accord with the National Agreement.

"In Paragraphs 'C' and 'E' a 'Joint industry Contract Committee' and 'Joint District Contract Committee' are set up to act as tribunals to try UMW or any operator for violation of the provisions of PWC.

"We note that the District Court has construed Paragraph 'A' of PWC as binding UMW to insist on identical terms against only 'signatories.' Paragraph 'A' does not so state, but on the contrary it clearly prevents UMW from entering into any agreement or even understanding on any basis other than those specified therein. To construe it otherwise tortures its plain language. The District Judge further found that after PWC, 'UMW' did in fact negotiate contracts only upon the wage and

labor standards set in the National Contract,' 344 F. Supp. 1037. The plain language of PWC required UMW to do exactly that.

"The Court further found 'that BCOA and its members did have a competitive motive, as evidenced by PWC itself and its administration, to seek such a result,' 344 F. Supp. 1037.

"These findings of the District Court not only do not support its ultimate conclusion of no agreement, but require a result opposite that reached by the District Court. The findings are clear that the parties to PWC, the union and the big operators, construed PWC as requiring the union not to enter into any agreement with other operators except on identical terms with the National Contract.

"After stating again that there was no direct evidence of conspiracy, the District Court was impressed by the fact that the officials of UMW and the big operators, in their testimony, denied that they conspired. It could hardly be expected that they would do otherwise. In any event, the acts of the officials of UMW and the big operators speak much louder than their words.

"The District Judge further stated that 'the motives of UMW and BCOA appear to have coincided,' but he was of the view that a 'coincidence of motives does not of itself connote a Sherman Act conspiracy ....' 344 F. Supp. 1038, 1039. While these motives may not constitute a conspiracy per se, they do constitute strong and persuasive evidence which, when considered along with the other written and oral evidence in the case, clearly establish the agreement.

"The District Court appears to have been influenced by the fact that the activities of the union, which the

Court graphically portrayed as including mass picketing, violence and bloodshed, would not have violated the Sherman Act if the union had acted unilaterally. But the fact is that UMW did not act unilaterally. It acted as it was required to act under the agreement with the big operators, each one aiding and abetting the other. The agreement provided even for methods of enforcing compliance therewith, by each party. These activities put the marginal operators out of business, as they could not operate under the onerous terms of the National Contract."

We submit for the foregoing reasons that the District Court and the Court of Appeals majority opinion have misconstrued and have failed to apply the instructions contained in this Court's mandate after the last appeal and accordingly this Court should correct these manifest errors of the lower Courts which possibly could be done without the necessity for another round of arguments. The last ruling of this Court should control.

II

UNDER THE REMAND FROM THE SUPREME COURT THE LOWER COURTS HAVE DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AND HAVE COMMITTED ERROR, HOLDING THAT THE TRIAL COURT IS ACTING WITHIN ITS DISCRETIONARY POWER, AND APPLYING ON APPEAL THE "CLEARLY ERRONEOUS" RULE, WHEN THE TRIAL COURT REVERSES ITS PREVIOUS FINDING OF IMPLICIT ILLEGAL AGREEMENT BASED UPON PREPONDERANCE OF EVIDENCE, WHILE AT THE SAME TIME REJECTING (AS CUMULATIVE EVIDENCE BARRED BY THE SUPREME COURT MANDATE) NEW

PROOF OF ASSOCIATION AND COMMITTEE MINUTES THAT STRONGLY SUPPORTS THE ORIGINAL FINDING, THE TRIAL COURT MAKING NO FINDINGS IN EITHER OF ITS OPINIONS ABOUT THE PRESSURE AND EXPRESS ANTICOMPETITIVE PURPOSES OF MAJOR COAL COMPANY ASSOCIATIONS IN GETTING THE UNION TO SIGN THE PROTECTIVE WAGE CLAUSE.

The District Court on the remand from this Court has rejected clear and persuasive documentary evidence of the utmost reliability with respect to the surrounding circumstances and practical construction of PWC, which proof shows that there was no concept of the application of PWC being limited to signatory units as held by the District Court, and which proof establishes the certainty of the previous finding of the District Court based on preponderance of evidence that there was at least an implied agreement that illegally restricted the Union's bargaining freedom with *all* units.

As to the statement by the District Court that the proof was "cumulative", at least three aspects of the situation should keep the Trial Court from having discretion to reject the evidence.

In the first place, as just pointed out, the Trial Court was reversing itself on a crucial finding of implicit illegal agreement based on a preponderance of evidence which previous finding was strongly supported by this rejected proof.

If a Court is going to change its mind some five years after its previous opinion, the only healthy and reasonable rule of law (a rule which the public could understand and respect) is that the Court would reopen the record to make sure that its belated change of mind is in accord with all known facts, whether in the old record or not. Even if

this rejected evidence was cumulative it should have been accepted and added to the weight of any other evidence on the issue.

On this first point it is to be noted that the majority opinion of the Court of Appeals says about the evidence in the old record:

> "It seems clear to us that the record in this case is one where the factual issues are close."

Judge Weick very pertinently remarks:

> "In a case where, as here, the majority opinion admits that the factual issues are close, the Court should have welcomed the offering of additional evidence. Even though part of such evidence was cumulative, it certainly strongly supported the evidence which was in the old record, at least to cause such additional evidence to preponderate in favor of the plaintiffs."

In the second place, if there was any other evidence in the old record to which this evidence was "cumulative" showing the pressure and anticompetitive and price-fixing purposes of the major coal associations in getting PWC into the contract, the Trial Court has made absolutely no findings about that in either of its opinions. Both opinions can be read and the reader will still have absolutely no idea that such proof exists. As Judge Weick says:

> "The Court does not point out what part was cumulative and what part was not cumulative. No findings of fact or conclusions of law were adopted by the Court with respect to the new evidence, making it impossible for an Appellate Court to review without reading the entire voluminous new evidence."

In the third place, the rejected evidence bore on the meaning and practical construction of PWC by the parties who drafted it, and was the only evidence in the record of this sort. The District Court in its first opinion made no findings of fact about the surrounding circumstances of PWC or its practical construction.

The Restatement of Contracts §235(d)(e), and all basic legal authority, recognize that proof of surrounding circumstances and practical construction is the primary aid to construe ambiguous writings. The Restatement of Contracts §236, characterizes as a "secondary rule" of construction the rule used by the District Court (265 F. Supp. 412), that an ambiguous writing will be given a "lawful" meaning where the other meaning would leave it unlawful, and the Restatement says this rule will be used only when there remains ambiguity after application of proof of surrounding circumstances and practical construction and the other primary rules of construction.

This case now comes back to this Court with still no effort below to construe PWC under primary rules of construction, but rather the rejection of the only evidence that could aid application of that primary rule. As Judge Weick stated:

> "The new evidence did portray the circumstances surrounding the entering into of PWC between the Union and the big operators, and the practical construction of it by the parties. The minutes of the Joint Industry Contract Committee, whose members drafted PWC, certainly threw light on the language of the agreement. Since PWC was claimed to be ambiguous, all of this evidence was certainly admissible."

All of the above aspects should deprive a Trial Judge of the discretion to exclude this evidence in this situation by calling it "cumulative."

Now, after the exclusion of that evidence and the reversing of a crucial finding previously made by the Trial Court, the Court of Appeals majority opinion has applied the "clearly erroneous" rule to the new finding of the Trial Court made in 1972 based on evidence presented (largely from depositions, documents and recorded prior testimony) to the Court in 1965. There were very few "live" witnesses on the issue of national conspiracy at the first trial and even as to the live testimony, Judge Weick points out:

> "The District Judge would have to have had a miraculous memory to recall the evidence and the credibility of witnesses throughout that protracted trial of seven years ago. It is obvious that the Court was required to and did refresh its recollection by examination of the many printed volumes of Appendices and the multitude of exhibits. Whether the District Judge in 1972 could have recalled also the manner and demeanor of the witnesses as they appeared before him in 1965 when he was applying an erroneous standard of proof, is open to serious question."

Judge Weick also says:

> "Now after the lapse of seven years, on reviewing a cold record the District Judge, in his second opinion changes his mind and tells us that his finding of fact on the preponderance issue, on which both this Court and the Supreme Court relied and clearly understood, was only dictum."

There is no explanation of why the "clearly erroneous" rule should not be applied to the first finding about preponderance of evidence (made when the testimony was much fresher in the Court's mind) rather than the second and reversed finding on this issue.

Judge Weick points out the rule that we believe should be applied in this situation as follows:

> "Because of the lapse of seven years time between the date of the trial and the second opinion of the District Judge, and his necessity of re-examination of the record, and because the original record consisted of over 5,600 pages and 450 exhibits (and the supplemental record is likewise voluminous), we regard it now as essentially a 'paper case' where the clearly erroneous test of rule 52(a) of the Federal Rules of Civil Procedure is inapplicable. *United States v. General Motors Corp.*, 384 U.S. 127 at 141 (1966); In re: *Clemens*, 472 F.2d 939, 941, n. 1 (Sixth Circuit, 1972).
>
> "In any event the ultimate conclusion of the District Judge is not shielded by the clearly erroneous rule.
>
> "In *United States v. General Motors*, *supra*, the Court said:
>
> > 'We note that as in *United States v. Parke, Davis and Company*, 362 U.S. 29, 44-45, the ultimate conclusion by the Trial Judge, that the defendant's conduct did not constitute a combination or conspiracy in violation of the Sherman Act, is not to be shielded by the "clearly erroneous" test embodied in rule 52(a) of the Federal Rules of Civil Procedure.' (384 U.S. at 141, n. 16)."

From the above we submit it is obvious that there has been a failure on the part of the lower Courts to apply accepted and usual rules that should have been applied, and there has been an application of rules that should not have been applied in the situation, so that the attainment of a fair and just result has been defeated.

III

A CONFLICT HAS DEVELOPED BETWEEN THE DECISION BELOW AND ANOTHER CIRCUIT COURT OF APPEALS IN APPLYING THE OPINION OF THE SUPREME COURT IN THIS CASE TO SIGNATORY OPERATORS DESTROYED BY THE EXPRESS RESTRAINT CONTAINED IN THE PWC, A MATTER DEALT WITH IN THE FIRST QUESTION ABOVE.

In contrast to the opinion of the District Court on remand and the majority opinion of the Sixth Circuit Court of Appeals on the second appeal in this case, the Court of Appeals for the Third Circuit on July 6, 1973 has affirmed without opinion the judgment against UMW in *Solar Fuel Company v. United Mine Workers*, (No. 72-1937 in the United States Court of Appeals for the Third Circuit) (affirming 346 F. Supp. 789) which judgment was based upon the destruction of a signatory to the National Contract by the insistence of UMW that National Contract terms be maintained in that unit, exactly as required by PWC as construed by UMW and the lower courts in this case.

In a Petition for Rehearing En Banc in the *Solar* case in the Third Circuit, UMW now emphasizes the language of the District Court in this case, about signatory operators and particularly the words that "plaintiffs' contention that the PWC constituted an express commitment in violation of the antitrust laws would appear to be partially self defeating in that most, if not all, of the plaintiffs were themselves parties to that agreement until December of 1962." The UMW Petition to Rehear goes on to say that the ruling of the District Court in *Solar* "flies in the face of these decisions."

As stated above petitioners contended on the last appeal that the construction of PWC by UMW and the District Court limiting the express restraint upon UMW's bargaining freedom to units which were signatories to the National Contract (which restraint must be for the life of PWC) violated the Sherman Act. Justice White's opinion necessarily deals with this question when he says:

> "Where a union, by agreement with one set of employers, insists on *maintaining* in other bargaining units specified wage standards ruinous to the business of those employers, it is liable under the antitrust laws for the damages caused by its agreed upon conduct." (401 U.S. at 313) (Emphasis supplied)

The UMW petition in *Solar* concludes:

> "Contrary to appellees' argument, *dicta* in Justice White's *Ramsey* opinion do not represent the settled state of the law; Justice White himself declined to speak one way or the other on this point, 401 U.S. at 311-12. This Court by its panel has affirmed the first imposition of liability on this novel basis, without discussion and in clear conflict with the decisions of other courts.
>
> "As stated herein, this case involves a broad issue of tremendous concern to labor unions engaged in collective bargaining ...."

Petitioners herein think that Justice White's opinion, particularly the sentence quoted above, is perfectly clear, but the lower Courts have rejected the rule there stated. UMW is now trying to get the Third Circuit to reject that language as *dicta*.

If UMW considers this question of "tremendous concern to labor unions" it goes without saying that it is also of

tremendous concern to small businesses who have to deal with labor unions.

While we think the rule laid down by this Court is clear petitioners and other small employers need to have the lower Courts corrected in the application of the rule. This could be done on this Petition without a great deal of delay and argument because the Court has already dealt with the question at the last hearing.

## CONCLUSION

For the reasons assigned, petitioners pray that the Petition for Writ of Certiorari be granted and that the Writ issue to review the decision and judgment of the United States Court of Appeals for the Sixth Circuit entered in cases No. 72-1926 and No. 72-1927 on June 19, 1973.

Respectfully submitted,

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## APPENDIX A

**Nos. 72-1926-27**
**UNITED STATES COURT OF APPEALS**
**For the Sixth Circuit**

GEORGE RAMSEY; LEON NUNLEY, d/b/a LEON NUNLEY COAL COMPANY: PAUL GIBBS, d/b/a PAUL GIBBS COAL COMPANY; LOIS HALL TRAVIS, Administratrix of the Estate of W. J. Travis, and EDNA GRAHAM, Executrix of the Estate of J. H. Graham, d/b/a NINTH WEST COAL COMPANY; A. & R. COAL COMPANY, INC.; W. T. MORRISON and EDNA GRAHAM, Executrix of the Estate of J. H. Graham, d/b/a M & G COAL COMPANY; J. H. GRAHAM COAL COMPANY, INC.; W. T. MORRISON and LOIS HALL TRAVIS, Administratrix of the Estate of W. J. Travis, d/b/a M & T COAL COMPANY; STEPHENSON BROTHERS COAL COMPANY, INC.; EDWARD NUNLEY, d/b/a EDWARD NUNLEY COAL COMPANY; EAST VALLEY COAL COMPANY, INC.; ELLIS WARD and LON L. VARNELL, d/b/a TRACY CITY COAL COMPANY; HENRY WILLIS FLYNN, d/b/a WILLIS FLYNN COAL COMPANY; H. W. FLYNN COAL COMPANY, INC.; HALLIE HIGGINS, Administratrix of the Estate of Howard Higgins, d/b/a HOWARD HIGGINS COAL COMPANY; HOWARD HIGGINS COAL COMPANY, INC.,

*Plaintiffs-Appellants*,

APPEAL from the United States District Court for the Eastern District of Tennessee, Southern Division

[fol. 2] v.

THE UNITED MINE WORKERS OF AMERICA,

*Defendant-Appellee.*

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TENNESSEE PRODUCTS AND CHEMICAL CORPORATION,

*Plaintiff-Appellant,*

v.

THE UNITED MINE WORKERS OF AMERICA,

*Defendant-Appellee.*

Decided and Filed June 19, 1973.

Before: WEICK, EDWARDS and KENT,* Circuit Judges.

EDWARDS, Circuit Judge. This is the second time these two cases have been before this court on the merits. On the first occasion our court, sitting en banc, divided four to four on the question as to whether or not the Norris-LaGuardia Act, 29 U.S.C. § 101 *et seq.* (1970), demanded application of the "clear proof" standard in determining whether defendants were guilty of a conspiracy to violate the antitrust laws (15 U.S.C. §§ 1, 2 (1970)). *Ramsey v. UMW*, 416 F.2d 655 (6th Cir. 1969). This division

* Judge Kent participated in the decision in this case and concurred in this opinion and the opinion was in the hands of the printer prior to Judge Kent's death on May 28, 1973. The procedural decision involved in this footnote is concurred in by Judge Weick who dissents on the merits. See p. 26.

affirmed the District Judge, who had held that the clear proof standard was applicable and that plaintiffs had failed to prove their case. *Ramsey v. UMW*, 265 F. Supp. 388 (E.D. Tenn. 1967).

On grant of certiorari the United States Supreme Court divided five to four and reversed. Justice White and four other Justices held that the clear proof standard [fol. 3] (See Section 6 of the Norris-LaGuardia Act, 29 U.S.C. § 106 (1970)) did not apply generally in an antitrust case against a labor union. The Supreme Court held that the clear proof standard applied only to the question of whether or not the defendant union had participated in, authorized, or ratified the acts claimed to constitute the antitrust violation. The Supreme Court also held that the preponderance of the evidence test would apply regarding the defendant's guilt on the alleged antitrust conspiracy. The case was then remanded to this court for remand to the District Court for reconsideration under the standard as newly defined. *Ramsey v. UMW*, 401 U.S. 302 (1971).

The District Judge in the first Ramsey case had held that there was neither an actual nor an implied conspiracy between the UMW and large mine owners under the clear proof standard. However, the District Judge also said:

> Were this case being tried upon the usual preponderance of the evidence rule applicable to civil cases, the court would conclude that the UMW did so impliedly agree. *Ramsey v. UMW*, 265 F. Supp. 388, 412 (E.D. Tenn. 1967).

When the District Judge reconsidered the entire record in the instant second *Ramsey* case (referring to the language just quoted above), he entered the following findings. They are the critical findings we must now review in this appeal:

As appears from the opinion, this conclusion was stated by the Court in connection with the discussion of the PWC and at a time when the Court was in fact weighing the evidence under the clear proof rule and not under the preponderance rule. It is accordingly proper that the Court should reconsider its previously stated conclusion with a view to determining whether it is justified when the evidence is carefully considered in light of the preponderance standard of proof. Such a reconsideration is further required by an ap-
[fol. 4] parently conflicting conclusion arrived at by the Court in the concluding portion of its former opinion wherein the Court stated:

"While many inferences favorable to the plaintiffs' contentions can reasonably be drawn from the evidence, in every instance a no less equally reasonable inference can be drawn to the contrary. The latter, when coupled with the positive denial of many witnesses of any conspiracy, as well as other inferences favorable only to the defendant's contentions, do not permit a finding based upon clear proof of an antitrust conspiracy." (265 F. Supp. 388 at 432)

Apart from the plaintiff's contentions regarding the Protective Wage Clause and as hereinabove considered, there is no direct evidence in the record of a conspiratorial agreement between the UMW and the BCOA.* As reflected by the record, every witness having personal knowledge of the negotiations and dealings between the UMW and the BCOA denied the existence of any agreement, secret or otherwise, wherein the Union conspired or commited itself to impose the wage and labor standards negotiated

* Bituminous Coal Operators Association (BCOA).

with the BCOA upon coal operators who were not members of the BCOA or who were not signatories to the contract negotiated with the BCOA. Making this denial were every officer and representative of the Union and every officer and representative of the BCOA who testified at the trial. Among the evidence now sought to be newly offered by the plaintiffs is the testimony of Mr. Moody. Even Mr. Moody, who as President of the Southern Coal Operators Association from 1946 to 1960 represented competitors of the BCOA in negotiations with the UMW, vehemently denies any such conspiracy. The statement in its former opinion that: "Every officer of the Union who testified, as well as every representative from the Coal Industry alleged to be in on the conspiracy, denied its existence." (265 F. Supp. 388 at 432) remains a correct statement.

[fol. 5] Accordingly, if a conspiracy is to be found, it must be found in the reasonable inferences to be drawn from proven facts. That is, it must be inferred from evidence.

The Court in its former opinion considered the various inferences that might be drawn from the various facts proven in the case. For example, the circumstances leading up to the 1950 National Contract and the changes that occurred at that time in the negotiating pattern followed by the Union are believed to be fully and correctly stated in the Court's previous opinion. The plaintiffs both then and now would have the Court infer from this evidence the beginning of an anticompetitive conspiracy between the Union and the major coal operators. The Court, however, has previously concluded:

"The Court can only say that upon the evidence to this point, it can discern no evidence of an incipient Sherman

Act conspiracy. Certainly the testimony of the principal negotiators for both the Union and the operators is emphatic to the contrary. To conclude inferentially otherwise on the basis of the wage scale negotiated is to engage in unwarranted speculation and is to disregard the undeniable right of the Union to seek to gear its wage scale to the ability to pay of the soundly solvent and not the marginal producer ... The circumstances of the negotiations as outlined above give no support in reason to such a conspiratorial inference. Rather, quite to the contrary." (265 F. Supp. 388 at 406 and 407).

Having now reconsidered the record under the preponderance rule, the Court can see no reason for altering these findings or conclusions.

Likewise, after recounting the evidence regarding the formation of the BCOA, the collective bargaining that occurred between 1950 and 1958 and the changes that occurred in the industry in these years, including the move to mechanization, the Court had these things to say:

[fol. 6] "That these more peaceful procedures suggest a Sherman Act conspiracy, however, is not reasonably to be inferred ... The economic pressure created by technological advances and the competition engendered thereby do not equate to a Sherman Act violation ... The Court being unable to infer any Sherman Act conspiracy from the record to this point, these matters must accordingly be considered subsequently in the light of the total record." (265 F. Supp. 388 at 408, 409 and 410).

Again, having reconsidered the record under the preponderance rule, the Court can see no reason for altering these findings or conclusions.

Passing for the moment the former discussion of the Protective Wage Clause and turning to the evidence regarding the UMW's investments in the West Kentucky Coal Company and the activities of that coal company upon the TVA market, the Court again finds its former statement of the facts to be in accord with the record when viewed in the light of the preponderance rule. The Court there stated:

> "The Court concludes that the evidence fails to establish that West Kentucky Coal Company or its subsidiary, Nashville Coal Company, engaged in predatory pricing of coal upon the TVA market. It rather appears that West Kentucky and Nashville based their prices upon legitimate business considerations and were attempting at all times to meet the competition, rather than lead the market downward. Having so concluded, it becomes unnecessary to consider further the responsibility of the U.M.W., if any, for West Kentucky and Nashville's coal pricing policies." (265 F. Supp. 388 at 422)

Likewise, the Court has again reviewed the record and its former findings as they relate to the Southeastern Tennessee coal field and the actions of the UMW regarding the plaintiffs in that coal field. After reciting the facts, the Court concluded:

[fol. 7] "Upon this record the U.M.W. could not be held chargeable for the violence, even were the standard of proof required that of a usual civil case. ... Clear proof does not appear, either directly or by inference, that the U.M.W. acted other than unilaterally in furtherance of its own interests and purposes in its activities in the Southeastern Tennessee coal field in the period here under review." (265 F. Supp. 388 at 429-430)

The former statement of facts is believed upon review to be correct. Although the conclusion reached was weighed upon the clear proof scale, upon reweighing upon the preponderance scale the Court now arrives at the same conclusions.

There remains to consider the inferences to be drawn from the PWC as well as the inferences to be drawn when considering the record as a whole rather than in its component parts.

As previously found, the PWC did not by its terms commit the UMW to impose the wage and labor standards negotiated with the BCOA upon other coal operators with whom it might deal in the future. Did it by implication do that which it has been found not to have expressly done? Wherein does the evidence preponderate on this issue?

In its original opinion the Court in what it deemed to be dictum concluded that the preponderance rule would favor an inference that the PWC did by implication what it had not expressly done. The Court was motivated to such a finding by three considerations. One consideration was that thereafter the UMW did in fact negotiate contracts only upon the wage and labor standards set in the National Contract. Another consideration was that BCOA and its members did have a competitive motive, as evidenced by the PWC itself and its administration, to seek such a result. A third consideration was that complaints were in fact registered with UMW by signatory operators from time to time regarding the competitive advantage of non-signatory operators.

[fol. 8] While each of these considerations remain persuasive with the Court, a careful review of the record would reveal other conflicting but equally persuasive considerations. While it is true that the UMW

negotiated only upon the basis of the National Contract after the PWC was placed in the contract in 1958, it is also true that long prior to 1958, in fact ever since 1941, the Union had negotiated all contracts on the same flat across-the-board wage increases. Although wage differentials between northern and southern operators had been negotiated prior to 1941, it was the stated purpose of the Union from its inception to establish uniform wage and labor standards. As previously noted by the Court, "It appears clear from the evidence that national uniformity in wage rates and labor standards in the coal industry has been a consistent policy and goal of the UMW since its inception in 1890." 265 F. Supp. 388 at 404. A union is always in competition with non-union labor. It is apparent that the wage differentials negotiated prior to 1941 had the effect of placing the Union in competition with itself and that the Union sought consistently to avoid or eliminate these differentials.

As regards any inference to be drawn from a competitive motive on the part of BCOA, upon further reflection it is apparent that in a competitive economy a competitive motive will be universal to all coal producers. To draw an inference of antitrust conspiracy from this motive would be somewhat of an anomaly.

Finally, as regards the inference to be drawn from the registering of complaints of competitive disadvantage with the UMW by contract signatories, it is apparent that complaints of coal operators of competitive disadvantage were universal in their origin and included the plaintiffs themselves. Perhaps one operator best summed up the attitudes of all operators when at a bargaining session he stated: "All I want is a fair advantage." Collective bargaining inevitably involves the discussion of the competitive effect of wage and labor standards.

[fol. 9] Although at the time the Court was weighing the inferences to be drawn from the PWC under the clear proof test it indicated a different result might follow were the preponderance rule to be applied, it is apparent upon careful review that the inferences to be drawn from the PWC are as consistent with unilateral action as they are with conspiratorial action and leave the Court to speculate in making the choice. Where equal inferences can be drawn and the Court is left to speculate, the plaintiffs have failed to carry their burden of proof. South-East Coal Co. v. Consolidation Coal Co., 434 F.2d 767 (6th Cir., 1970). *Ramsey v. UMW*, 344 F. Supp. 1029, 1035-38 (E.D. Tenn. 1972).

We have indulged this lengthy quotation from the District Judge's opinion in the second *Ramsey* case after his review of the record on remand from the United States Supreme Court because it sets out his point of view on two of the three major issues of this appeal which we state below as we see them:

I. Was the District Judge on this review of the evidence on remand bound by his previous statement that if he were trying the case under the preponderance of the evidence rule, he would conclude that the UMW had impliedly entered a conspiracy?

II. Are the District Judge's findings of fact, after review of the record on remand as set out above, clearly erroneous under FED. R. CIV. P. 52(a)?

III. Did the District Judge commit reversible error by failing to receive in the record the additional exhibits and depositions tendered by plaintiffs-appellants on their motion for opening the record for additional evidence?

*I. The Law of the Case Question*

Of course, if the District Judge's comment in first *Ramsey* was as appellants now argue "the law of the case," this would end the matter and we would not need to answer any other questions. Significantly, however, if it had been, the United States Supreme Court would not have needed to remand this case for the District Judge [fol. 10] for reconsideration under the preponderance of evidence standard and in the light of the Supreme Court opinion.

In first *Ramsey*, in the Supreme Court the appellant companies sought reversal and remand "with direction that UMW be adjudged in violation of" the Sherman Act, and that a new trial be granted "for the determination of damages ... or in the alternative that" appellants "be granted a new trial." It is, however, clear to us that the Supreme Court granted neither of these forms of relief. As previously noted, the Supreme Court's majority opinion held that the clear proof standard had been erroneously applied below in first *Ramsey* and that the existence of an antitrust conspiracy must be redetermined by normal preponderance of proof standards. It remanded, noting at one point, "To what extent the proof would fail under the standard we here hold applicable and what legal difference it might make are matters open to be dealt with on remand." *Ramsey v. UMW*, 401 U.S. 302, 308 n. 5 (1971). Thus we believe that the Supreme Court clearly did not view the first *Ramsey* preponderance of evidence comment by the District Judge as "the law of the case" as appellants now contend.

Additionally, and for the reasons which we have quoted from the District Judge in his opinion in second *Ramsey*, we hold that the comment was dictum and appropriately

subject to the District Judge's reconsideration on the total record when the case had been remanded to him.

*II. Are the District Judge's Findings "Clearly Erroneous"?*

As to the principal issue in this case, on review of this total record, this court finds that it cannot hold that the District Judge's findings of fact on the antitrust conspiracy issue are clearly erroneous. Rule 52(a) of the Federal Rules of Civil Procedure provides:

> Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility [fol. 11] of the witnesses. FED. R. CIV. P. 52(a).

Thus, however we might individually view the evidence if we were the triers of fact, it is clear that we are required to give great weight to the findings of the trial court which had the opportunity to see the witnesses, to weigh their evidence as it was presented, to view the demeanor of the persons who testified in court, and to determine all issues of credibility.

The testimonial record which we now review is, of course, identical with that which this court reviewed prior to its decision of the first *Ramsey* case. In the opinion in this court which affirmed the District Judge by equally divided vote, we said:

> The essence of appellants' evidence of conspiracy to drive BCOA's competitors out of business consisted of 1) evidence of UMW attempts to organize the Southeastern Tennessee coalfields, including the operations of appellants; 2) the claimed violent and disastrous economic impact of these activities, and 3) the purchase of substantial stock in the West Kentucky Coal Co. by

the UMW and the subsequent "price cutting" activities of West Kentucky Coal which appellants assert served to drive Southeastern Tennessee coal out of the TVA market.

The District Judge's analysis of the evidence he heard is masterly. His opinion covers 52 pages of volume 265 of Federal Supplement and while we affirm it for purposes of our decision on the facts, in view of its ready availability we shall quote from it selectively.

Briefly put, the District Judge found in essence that 1) the UMW in its organizing activities in the Southeastern Tennessee coalfields was pursuing its own and its own members' interests rather than those of the BCOA; 2) appellants' economic troubles stemmed as much (or more) from the geological structures of the Southeastern Tennessee coalfields which made mechanization of the mines to meet oil, gas and electrical competition difficult and from under capitalization and bad management as they did from the activities
[fol. 12] of the UMW, and 3) that the total record did not support the charge that defendant conspired with West Kentucky Coal so as to engage in predatory price cutting in the TVA market.[3]

The District Judge's findings on these issues included:

1) "[P]icketing and violence are not per se evidence of a Sherman Act conspiracy. Thus the strike, ratified by the U.M.W., and picketing, to the extent that it re-

[3] We note here that West Kentucky Coal Company was not a defendant in this antitrust conspiracy case as of the time of trial. A stipulation to dismiss it as a defendant had been entered into by plaintiffs. This left the UMW as the only target of this suit alleging an antitrust conspiracy to drive the BCOA's competition out of business. While this fact alone does not justify dismissal of the suit against the UMW, it does seem to cast doubt upon the good faith of the predatory intent aspect of plaintiff's case.

ceived U.M.W. approval, and not the violence unconnected upon the record with the U.M.W., may be looked to as they may or may not demonstrate the purpose of the U.M.W. to conspire with others to impose the National Bituminous Coal Wage Agreement upon the Southeastern Tennessee coal field. The record in this regard fails to show any direct evidence of a Sherman Act conspiracy. Whether such an inference can be drawn must depend upon a review of all of the evidence upon the present phase of the case, to be followed by a review of all of the evidence upon all phases of the case.

"Upon review of the evidence as it relates to the Southeastern Tennessee coal field and of the U.M.W.'s activities therein, the following conclusions appear to be clearly supported by the evidence:

"(1) To operate successfully the producers in the Southeastern Tennessee coal field must be able to compete and survive on the T.V.A. coal market. Since 1954 50% or more of all coal produced in the State of Tennessee has had to find its market with the [fol. 13] T.V.A. That figure reached as high as 78% in 1956 and by 1962 was still at 64.3%.

"(2) Due to the geological conditions, the Southeastern Tennessee coal fields cannot achieve a level of productivity equivalent to that of its principal competitors on the T.V.A. coal market. This competitive disadvantage is offset in part by the transportation and quality advantages which the field has over its principal competitors in the T.V.A. market at the Widow's Creek steam plant.

"(3) In the period since 1960 the coal operators in the Southeastern Tennessee coal field have been unable to compete and survive in the T.V.A. coal market under

the National Bituminous Coal Wage Agreement. While in many instances this appears to have been due to antiquated mining methods and equipment or other causes, the fact nevertheless remains that since 1960 there has not been a single instance of a successful coal mining operation in the Southeastern Tennessee coal field under the National Bituminous Coal Wage Agreement and this in spite of the fact that the only feasible alternative facing most coal operators in the area was to operate under the national contract or go out of business.

"Further than this the Court cannot go. Clear proof does not appear, either directly or by inference, that the U.M.W. acted other than unilaterally in furtherance of its own interests and purposes in its activities in the Southeastern Tennessee coal field in the period here under review. In this regard the plaintiffs rely upon the defendant's advocacy of mechanization as a solution to the operators' competitive difficulties as one element of proof demonstrating a conspiracy, in that the U.M.W. was in fact attempting to force mechanization upon a coal field which it knew to be unsuited by geology therefor and at a rate that the U.M.W. knew was impossible for all but the largest coal operators in the nation. This contention does not appear to ac-
[fol. 14] cord with the evidence. In the first place, it does not appear that mechanization would be ineffective in rendering the Southeastern Tennessee coal field competitive. Both Allen & Garcia and Grundy Mining Company appear to have been well on the way toward raising productivity to competitive levels by mechanization when their efforts were thwarted or halted by seniority and strike difficulties. In the second place, it does not appear that mechanization is beyond the economic capacity of all but the larger

producers on the national scene." Ramsey v. United Mine Workers of America, 265 F. Supp. 388, 430 (E.D. Tenn. 1967).

* * *

"Reviewing the evidence as a whole in this light, the Court is unable to find that the evidence clearly reflects that the plaintiffs were the victims of any conspiracy between the U.M.W. and any coal operators or other non-labor organization to eliminate or suppress competition in the coal industry or to eliminate or suppress the production and sale of coal by the plaintiffs. While many inferences favorable to the plaintiffs' contentions can reasonably be drawn from the evidence, in every instance a no less equally reasonable inference can be drawn to the contrary. The latter, when coupled with the positive denial by many witnesses of any conspiracy, as well as other inferences favorable only to the defendant's contentions, do not permit a finding based upon clear proof of an antitrust conspiracy." 265 F. Supp., *supra* at 432.

2) "The seam of coal in the Southeastern Tennessee coal field, called the Sewanee seam, is located in a mountainous area of the State at an elevation of approximately 1800 feet. It is a rather high grade metalurgical coal. That is, it is usable for making coke for metalurgical purposes. However, the field has certain geological disadvantages. The principal of these is the thinness of the seam. The average thickness of the [fol. 15] Sewanee seam appears to vary from 36 to 42 inches, but the seam is highly irregular in this respect. The seam is subject to squeezes and rolls in a very irregular and unpredictable manner; that is, the thickness of the seam varies and these conditions have no pattern. The seam may in one place be squeezed

to a matter of a few inches in thickness or may be entirely pinched out by rock. In other places the coal may be rolled into a thickness up to six feet. Hazardous roof conditions are often encountered, especially in the areas of the rolls. The topography of the area is largely mountainous. Accordingly, most mining must be done underground, and the field does not lend itself to strip mining due to excessive overburden except in limited areas.

"These geological conditions place the Southeastern Tennessee coal field at a disadvantage with many other coal fields. For example, whereas only 32% of the coal produced in Tennessee is produced from seams over four feet thick, 65% of the coal comes from seams over four feet thick in the United States as a whole. The irregular nature of the seam, its thinness and difficult roof conditions all pose problems for mechanization.

"Geological conditions are among the matters claimed by the plaintiffs as rendering application of the National Bituminous Coal Wage Agreement to this field economically impossible, and therefore demonstrating the conspiratorial purpose of the U.M.W. in disregarding these conditions and seeking to force the national contract upon the field. This can more appropriately be evaluated after development of the history of the field in its relations with the U.M.W. Suffice it to say at this time that geological conditions have of course been a factor in competition with other coal producing areas and had their effect upon mining practices followed in the Southeastern Tennessee field. However, other conditions largely unrelated to geological con-
[fol. 16] ditions have likewise played a part. These include management policies, a general under-

capitalization throughout the field, the pyramiding of leases, the nature of the T.V.A. coal market, labor practices and attitudes upon the part of workers and collective bargaining as practiced in the field." 265 F. Supp., *supra* at 424.

3) "Turning first to the activity of West Kentucky (and Nashville) upon the T.V.A. spot market, it is the contention of the plaintiffs that these companies dumped extraordinarily large quantities of coal upon the spot market at steadily declining prices, particularly during the period from 1956 through 1958, forcing the price from 21.37¢ per million b. t. u. in 1958. (In translating a b. t. u. price to a tonnage price, the quality of coal is a significant factor. However, on the average one cent per million b. t. u. is equal to approximately 25¢ per ton on a tonnage price basis.) The evidence does not sustain the plaintiffs' charge. Although West Kentucky bid in 1956, its bid in each instance was well above the market and it did not receive a single award. An analysis of the bids in 1957 and 1958 reveals that West Kentucky bid 22 times on the spot market, but received only five awards, these successful bids all being from Nashville Coal Company's Uniontown mine to the T.V.A. Shawnee steam plant. In not a single instance was West Kentucky the low bidder. In the first eight bids it was unsuccessful. On the ninth bid it got an award, but was the highest successful bidder. Its 10th, 11th and 12th bids were unsuccessful. Its 13th bid was successful, but again it was the highest successful bidder. Its 14th and 15th bids were unsuccessful. Its 16th and 17th bids were bid at the same price as the 14th and 15th bids, and were successful this time. In the 16th bid it was the highest successful bidder and in the 17th there were several lower bids.

[fol. 17] The 18th and 19th bids, at the same price as the four previous bids, were unsuccessful. The 20th bid was successful but was the second highest offer and there were no unsuccessful bidders on this solicitation. The 21st bid, at the same price, was unsuccessful. The 22nd bid was successful, but only by .02 mils per million b. t. u." 265 F. Supp., *supra* at 419.

* * *

"The following table is reconstructed from the record and reflects the bidding of West Kentucky on the T.V.A. term coal market in the period from 1959 through 1963:

| Date of Bid | T. V. A. Requisition # | Price Per Ton (f.o.b. mine) | Evaluated Relation to Other Bids | Award Made |
|---|---|---|---|---|
| 7/27/59 | 27 | $2.90 | 4th from lowest | T-3 |
| 2/ 9/60 | 32 | $2.90 | 19th from lowest | None |
| 9/ 1/60 | 35 | $3.00 | 5th from lowest | None |
| 2/14/61 | 37 | $2.90 | 3rd from lowest | T-24 |
| 9/18/62 | 41 | $2.90 | 7th from lowest | T-18 |
| 1/15/63 | 42 | $2.90 | 3rd from lowest | None |
| 6/19/63 | 43 | $2.90 | 2nd from lowest | None |
| 10/15/63 | 44 | $2.90 | Low bid | T-6 |

While the above table does not reflect the fact that the bid evaluations, due to transportation costs, varied from one steam plant to another, the evaluations used were either those upon which an award was made, or in event West Kentucky was unsuccessful in its bid, upon the evaluation most favorable to the plaintiffs. In only one instance was West Kentucky the low bidder and this was at the Gallatin plant where it enjoyed a transportation advantage. At the Widow's Creek plant West Kentucky was never closer than third from the lowest bidder, and this was only after the Section 22 freight rate reduction had been placed into effect.

"In this regard the plaintiffs sought to substantiate their conspiracy claim by reference to a freight rate reduction granted by the Interstate Commerce [fol. 18] Commission in 1960 under Section 22 of the relevant statute. In that year The Louisville and Nashville Railroad Company and the Tennessee Valley Authority joined in requesting a rate reduction of railway freight rates for hauling coal from the western area of Kentucky to the Widow's Creek steam plant, the request being to reduce this rate from $2.40 per ton to $1.60 or $1.40 per ton, depending upon the volume hauled. This reduction was opposed by coal operators in the Southeastern Tennessee coal field. The reduction was granted by the Interstate Commerce Commission. There is no evidence that this had any relation to any conspiracy involving either the U. M. W. or West Kentucky Coal Company. In any event, since it involves an appeal to a governmental agency, it could not involve a Sherman Act violation. United Mine Workers v. Pennington, 381 U.S. 657, 86 S. Ct. 1585, 14 L. Ed. 2d 626.

"The Court concludes that the evidence fails to establish that West Kentucky Coal Company or its subsidiary, Nashville Coal Company, engaged in predatory pricing of coal upon the T.V.A. market. It rather appears that West Kentucky and Nashville based their prices upon legitimate business considerations and were attempting at all times to meet competition, rather than lead the market downward. Having so concluded, it becomes unnecessary to consider further the responsibility of the U.M.W., if any, for West Kentucky and Nashville's coal pricing policies." 265 F. Supp., *supra* at 422. (Footnote omitted.)

There is ample evidence in this record to support these findings; and we certainly cannot hold them to be "clearly erroneous." Fed. R. Civ. P. 52(a). *Ramsey v. UMW*, 416 F.2d 655, 663-67 (6th Cir. 1969).

As we have previously noted the District Judge has reviewed these findings of fact under the preponderance of evidence rule and reaffirmed them.
[fol. 19]

On review of this lengthy record on remand and second appeal, we again hold that the District Judge's findings of fact are supported by substantial evidence and are not clearly erroneous.

It seems clear to us that the record in this case is one where the factual issues are close. The basic decisions (aside from the legal question of standard of proof) are for the finder of fact, whether that be a judge or a jury. This is, we think, the lesson of first *Ramsey v. UMW*, 401 U.S. 302 (1971), and it certainly is the lesson of "second *Pennington*" (*Lewis v. Pennington*, 257 F. Supp. 815 (E.D. Tenn. 1966), *aff'd*, 400 F.2d 806 (6th Cir. 1968), *cert. denied sub nom, Pennington v. United Mine Workers*, 393 U.S. 983 (1968), *rehearing denied*, 393 U.S. 1045 (1969)). In *Pennington*, where the central allegations of antitrust conspiracy were identical with those in this case, and the Bituminous Coal Operators Association (BCOA) and UMW agreement of 1950 (as amended) with its Protective Wage Clause was the central legal document, the Supreme Court denied both certiorari and a rehearing after the Sixth Circuit had affirmed District Judge Taylor's dismissal of the complaint for failure to prove the antitrust conspiracy. Judge Taylor had held that such a result was required regardless of whether the standard of evidence was clear proof or preponderance of the evidence.

*III. Motion to Reopen*

The third and final appellate issue of concern to us in this case is whether or not the District Judge should have reopened the record to allow the admission into evidence of the exhibits and depositions which plaintiffs sought to have admitted.

At the outset we note that the District Judge clearly read and considered all of the material which plaintiffs desired to present, and it is before us in the form of an offer of proof, and, like the District Judge, we have reviewed it. At oral argument counsel for plaintiffs on a direct question from the court informed us that if the case were remanded to the District Court, plaintiffs would have no further evidence to offer.

[fol. 20]

Judge Wilson's handling of this issue is set forth in the paragraphs of his opinion which follow:

> Before undertaking a reconsideration of the evidence as a whole, as distinguished from its component parts as the Court has done to this point, it is appropriate that the Court should consider plaintiffs' motion to be allowed to reopen the proof in this case. In support of their motion the plaintiffs have made an offer of proof which consists of (1) the Minutes of the Joint Industry Contract Committee relating to the administration of the PWC by that Committee; (2) the deposition of Joseph E. Moody, President of the Southern Coal Producers Association from 1946 to 1960, together with the reports and minutes of that Association; (3) the deposition of Elmer C. Hill, Chief of the Fuels Procurement Branch of the TVA, who testified to the cancellation by West Kentucky Coal Company in 1965 of its long term coal sales agreements for the sale of

coal to the TVA at the price of $2.90 per ton; and (4) stipulations entered in another lawsuit relating to the formation of the BCOA and including minutes of that Association and certain financial data. The Court has read and considered all of this evidence. Although voluminous, it is in very substantial measure cumulative to the proof offered upon the trial. The newly offered evidence offers no new theories of liability and presents no significant alteration of the evidence as presented upon the trial. The Court can envision no injustice in declining to reopen the trial. In view of the very extensive trial upon the issues, the substantially cumulative nature of the newly tendered proof, and the direction upon remand in this case, the Court is of the opinion that the motion to reopen the proof should be denied. *Ramsey v. UMW*, 344 F. Supp. 1029, 1038 (E.D. Tenn. 1972).

[fol. 21] We believe that it was the purpose of the Supreme Court remand to have the trial court review the original trial record on the standard of proof which the Supreme Court had declared to be the proper and legal one. There is not a line in Justice White's opinion which contains a suggestion that the record should be reopened on remand for the taking of additional evidence. We have no doubt that this fact strongly motivated the view on this issue taken by the District Judge, as it does us.

Generally, of course, parties to litigation must present their evidence when the case is called for trial. It is normal to wish to present additional evidence after once having lost a dispute of fact. But, of course, such a practice would lead to never-ending litigation. Additionally, reopening proof on the motion of one party long after trial

has been completed can put the opposite party at a distinct disadvantage. Generally, motions for reopening are held to rest in the sound discretion of the trial judge. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 331 (1971); *Swartz v. New York Central R.R. Co.*, 323 F.2d 713, 714 (7th Cir. 1963); *Locklin v. Switzer Brothers, Inc.*, 299 F.2d 160, 169-70 (9th Cir. 1961), *cert. denied*, 369 U.S. 861 (1962); 6A J. MOORE, FEDERAL PRACTICE ¶ 59.04[13] (2d ed. 1966).

Like the District Judge, however, we too have reviewed the evidence the plaintiffs-appellants sought to have admitted, and, like him, we do not think it changes the balance in this case. The additional evidence proffered was largely cumulative. We affirm the District Judge's decision denying the motion to reopen the record for the presentation of additional evidence. In the alternative, if this were held to be error, we would also hold that on the totality of evidence in this record (including consideration of the proffered evidence), such error was harmless. FED. R. CIV. P. 61.

## *IV. The Dissent*

As we read the dissent, it argues two additional issues which we had not thought to be presented: 1) [fol. 22] that under the Supreme Court remand appellants were entitled to a new trial, and 2) that appellants were entitled to prevail because the Protective Wage Clause represented a per se violation of the antitrust laws.

*New Trial.* The appellants, Ramsey, et al., had, indeed, sought a new trial. Appellant's brief before the Supreme Court contained the following paragraph:

*Conclusions and Relief Sought*

For the foregoing reasons, petitioners request this Court to reverse and set aside the judgments of the Sixth Circuit herein complained of, as well as the District Court's judgments, and to remand the cases with directions that UMW be adjudged in violation of the Sherman Act and that a new trial be granted for the determination of damages suffered by the petitioner under 15 U.S.C. Section 15, or, in the alternative, that petitioners be granted a new trial.

The Supreme Court did not grant either a new trial or a new trial limited to damages. Its order provided:

> We reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion. *Ramsey v. United States Workers*, 401 U.S. 302, 314 (1971).

We have no doubt that if the Supreme Court had intended remand for new trial, it would surely have said so. In the case principally relied upon by the dissent, the order of the Supreme Court said in applicable part as follows:

> [T]he Court of Appeals shall remand the case to the District Court for a new trial. *Byrd v. Blue Ridge Rural Electric Cooperative*, 356 U.S. 525, 540 (1958).

The Supreme Court remand clearly did not order either full or partial retrial of this lengthy and bitterly [fol. 23] disputed litigation. Nor did this court's remand to the District Court do so.

Further, we find nothing in appellants' motion before the District Court, nor in their brief in this court, which either seeks or claims a right to a new trial. Before this

court appellants' counsel specifically stated that the evidence proffered before the District Court was all that appellants wished to offer. We believe that the Supreme Court remanded this case for reconsideration of the original record under the newly declared standard of proof. For the reasons we have outlined in Section III of this opinion, we believe also that while the District Judge might, in the exercise of his discretion as trial court judge, have reopened proofs to allow additional materials into the record, he did not abuse that discretion in declining to do so.

*The Per Se Violation.* The District Judge considered the per se argument when this case was remanded to him:

> With regard to the Protective Wage Clause (PWC), the plaintiffs reassert their former contention, namely that, as negotiated between the United Mine Workers (UMW) and the Bituminous Coal Operators Association (BCOA) in 1958 and inserted in the National Bituminous Coal Wage Agreement in that year, the PWC, upon proper construction, was an illegal bargain struck between the BCOA and the UMW wherein the latter expressly agreed to impose the wage and labor standards negotiated with the BCOA upon all other coal operators with whom it might in the future negotiate, thereby stripping the UMW of its freedom to bargain and its labor union exemption under the antitrust laws. These matters were carefully considered by the Court in its former opinion. The conclusion was there reached that the PWC was limited to signatories only and did not commit or limit the Union in its bargaining with non-signatory coal operators (265 F. Supp. 388 at 412). Not only was this conclusion approved upon appeal in this case (416 F.2d 655 at 657), but the same conclusion

[fol. 24] was arrived at by both the trial court and the Court of Appeals in the case of *Lewis v. Pennington*, 257 F. Supp. 815 at 862, affirmed 400 F.2d 806 at 814.

The plaintiffs have approached the PWC from a somewhat new theory in their presentation upon remand. That theory is that the PWC would by its express terms limit the UMW in its future negotiations with all previous signatories of the National Agreement, thereby removing its exemption from the antitrust laws as a labor, at least as to previous signatories. Some, if not all, of the plaintiffs herein were such previous signatories. The difficulty with this position is the same as with the plaintiffs' previously stated position, and that is that the PWC refers neither to future previous signatories, but rather refers to "signatory operators" and to "employees covered by this contract." The conclusion must accordingly be the same as was reached in the former opinion, namely that the PWC did not constitute an express commitment upon the part of the UMW to bargain with other coal operators only upon terms set forth in the contract made with the BCOA.

It may properly be noted here that nothing in the new evidence tendered in support of the plaintiffs' motion to reopen the proof would tend to alter this construction of the terms of the PWC. It may likewise be noted that the plaintiffs' contention that the PWC constituted an express commitment in violation of the antitrust laws would appear to be partially self-defeating in that most, if not all, of the plaintiffs were themselves parties to that agreement until December of 1962. *Ramsey v. United Mine Workers*, 344 F. Supp. 1029, 1034 (E.D. Tenn. 1972).

We agree.

In the prevailing opinion of this court in our first review of the *Ramsey* case, we dealt extensively with the argument that the Protective Wage Clause constituted a per se violation of the antitrust laws and held that it could not properly be construed to do so. See *Ramsey* [fol. 25] *v. United Mine Workers*, 416 F.2d 655, 657-659 (6th Cir. 1969), *rev'd on other grounds*, 401 U.S. 302 (1971). On review of this issue we now incorporate and adopt the reasoning of that opinion on the per se issue as set forth on pages 657-659, *supra*.

The judgment of the District is affirmed.

[fol. 26] WEICK, Circuit Judge, dissenting. At the outset it should be pointed out that the majority is in error in stating:

> "We believe that the Supreme Court remanded this case for reconsideration of the *original* record under the newly declared standard of proof." (Emphasis added.) (*Infra*, at 23.)[1]

The remand ordered by the Supreme Court contained only the following language:

> "We reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion." 401 U.S. 302 at 314.

It will be noted that no such limiting language of the majority opinion can be found in the Supreme Court's opinion, in its remand order, or in our remand. If the

[1] The opinion of the en banc court, which lacked concurrence of a majority of the Judges of this Court, merely copied and approved the panel's slip opinion. The judgment of the District Court was affirmed only by an equally divided Court, which decision was reversed by the Supreme Court.

Supreme Court ever intended to confine the parties to the old record of the 1965-trial on the remand, it would certainly have said so in appropriate language. Likewise, if we intended to restrict the District Court to the original record, we should have used definite and clear language to that effect.

If there was any doubt about the matter (and there is not) it is resolved by examination of our order entered pursuant to the Supreme Court's mandate, vacating the judgment of the District Court and remanding to that Court, which order provided as follows:

> "This cause is now before this Court upon the mandate of the United States Supreme Court, and in obedience thereto, IT IS HEREBY ORDERED:
>
> 1) that this cause be, and it is, hereby remanded to the United States District Court for the Eastern District of Tennessee, Southern Division;
>
> [fol. 27] 2) that the judgment of the said District Court heretofore entered in this cause be, and it is, hereby vacated; and
>
> 3) that further proceedings be had in said Court and cause consistent with the opinion of the United States Supreme Court, announced February 24, 1971, and reported as *Ramsey v. United Mine Workers*, ... U.S. ..., 39 U.S.L. Week, 4245."

Thus it is clear that the judgment of the en banc court, which automatically affirmed the judgment of the District Court, was reversed by the Supreme Court, and we in turn, instead of considering the matter further, vacated the judgment of the District Court and remanded for further proceedings consistent with the opinion of the Supreme

Court, Our order of remand, like that of the Supreme Court, did not confine the District Court to consideration of only the old record.

As a result of the orders of the Supreme Court and of this Court the judgment of the District Court was opened and all that was before the Court on the remand was a pending action in which each of the parties was entitled to a new trial as a matter of right. The order of remand of the Supreme Court and that of this Court merely required the District Court, in its consideration of the case, to apply the preponderance of evidence rule on the charge of antitrust violation, instead of applying the clear proof rule which it had erroneously applied in the first trial.

The trouble is that the District Court erroneously treated the remand in the same manner as the majority now treats it. The District Court even denied the plaintiffs a hearing, including their right to offer additional new documentary evidence. In so doing the District Court not only abused its discretion but it deprived the plaintiffs of their due process rights.

Plaintiffs filed in the District Court a "Motion of Plaintiffs for an Order Opening the Record for Addi-
[fol. 28] tional Evidence and Setting the Times for the Production and Filing of Such Evidence." Attached to the motion was documentary proof which had not been offered in evidence at the 1965-trial.

In its opinion the District Court conceded that the proof had been proffered, stating:

> "In support of their motion the plaintiffs have made an offer of proof which consists of (1) the Minutes of the Joint Industry Contract Committee relating to the

administration of the PWC by that Committee; (2) the deposition of Joseph E. Moody, President of the Southern Coal Producers Association from 1946 to 1960, together with the reports and minutes of that Association; (3) the deposition of Elmer C. Hill, Chief of the Fuels Procurement Branch of the TVA, who testified to the cancellation by West Kentucky Coal Company in 1965 of its long term coal sales agreements for the sale of coal to the TVA at the price of $2.90 per ton; and (4) stipulations entered in another lawsuit relating to the formation of the BCOA and including minutes of that Association and certain financial data." (344 F. Supp. at 1038).

The plaintiffs state that their proffer and its purpose were as follows:

"This Motion had attached to it documentary evidence which had been produced in later cases which evidence plaintiffs offered to give conclusive proof there was an implicit 'quid pro quo' deal made by UMW such as had been found on the preponderance of evidence, but also and more particularly to prove the circumstances and intentions of the parties in writing the PWC in the national contract in 1958, and the practical construction given that clause by the parties who drafted it in their activities as members of the Joint Industry Contract Committee (JICC) which policed the PWC. This evidence was largely in the form of the minutes of committees and of coal associations which sponsored the PWC and also the deposition of the head of one [fol. 29] of the coal associations who was the prime mover in bringing the PWC into being (App. pp. 22a-179a)." (Appellants' Brief, p. 6).

There was a "quid pro quo" whereby the union stipulated that it would not enter into collective bargaining agreements with other operators except on the same wages, hours and working conditions as were contained in the national contract, and the operators, who were signatories to the national contract, in turn agreed to boycott coal not produced by others in conformity with said contract.

The "quid pro quo" was admitted by counsel for UMW in *Tennessee Consol. Coal Co. v. UMW*, 416 F.2d 1192 (6th Cir. 1969), *cert. denied*, 397 U.S. 964 (1970), and was referred to by the Supreme Court in *Ramsey*, 401 U.S. at 305, n. 1. We also discussed "quid pro quo" in *Riverton Coal Co. v. UMW*, 453 F.2d 1035, at 1039, 1040, n. 2 (6th Cir. 1972), *cert. denied*, 407 U.S. 915.

They even set up a joint committee to enforce compliance by the parties.

Since the case was already reopened, it was unnecessary for plaintiffs to file a motion to reopen. Plaintiffs were entitled to offer the new evidence as a matter of right.

In *Byrd v. Blue Ridge Rural Elec. Co-Op. Inc.*, 356 U.S. 525 (1958), the plaintiff recovered a judgment for personal injuries against the defendant in the District Court, which had stricken defendant's defense of Workmen's Compensation. The Court of Appeals reversed and remanded with instructions to dismiss the complaint. The Supreme Court reversed the dismissal of the complaint, holding that the case should be remanded for a new trial because plaintiff did not have the opportunity to offer evidence in the District Court on the changed ruling on Workmen's Compensation. Mr. Justice Brennan, who wrote the opinion for the Court, stated:

"At all events, the petitioner is plainly entitled to have an opportunity to try the issue under the [fol. 30] Court of Appeals' interpretation. His motion to dismiss the affirmative defense, properly viewed, was analogous to a defendant's motion for involuntary dismissal of an action after the plaintiff has completed the presentation of his evidence. Under Rule 41(b) of the Federal Rules of Civil Procedure, in such case 'the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief.' " (356 U.S at 532).

Justice Brennan further stated that the Workmen's Compensation issue should be submitted to the jury for determination.

So, in our case, the plaintiffs must be afforded the opportunity to try the issue under the Supreme Court's interpretation. This does not mean that the record of the 1965-trial may not be used. The District Court should consider the old record supplemented with such additional evidence as either of the parties may offer. *White v. Rimrock Tidelands, Inc.*, 414 F.2d 1336 (5th Cir. 1969).

The reasons given by the District Court for denial of a hearing and an opportunity to offer new evidence on the remand cannot be supported. The Court stated:

"The Court has read and considered all of this evidence. Although voluminous, it is in very substantial measure cumulative to the proof offered upon the trial. The newly offered evidence offers no new theories of liability and presents no significant alteration of the evidence as presented upon the trial. The Court can

envision no injustice in declining to reopen the trial. In view of the very extensive trial upon the issues, the substantially cumulative nature of the newly tendered proof, and the directions upon remand in this case, the Court is of the opinion that the motion to reopen the proof should be denied." (344 F. Supp. at 1038).

It is obvious that the evidence proffered was new, but the Court excluded it because "[a]lthough voluminous, it is in very substantial measure cumulative to the proof offered upon the trial." The [fol. 31] Court does not point out what part was cumulative and what part was not cumulative. No findings of fact or conclusions of law were adopted by the Court with respect to the new evidence, making it impossible for an appellate court to review without reading the entire voluminous new evidence.

The Court's statement that it read and considered the new evidence is a nonsequitur. Having considered the new evidence, the Court should have admitted it and adopted findings of fact and conclusions of law with respect to it.

It is not important that the new evidence offered "no new theories of liability and presents no significant alteration of the evidence as presented upon the trial." What was important is the fact that the new evidence did portray the circumstances surrounding the entering into of PWC between the union and the big operators, and the practical construction of it by the parties. The minutes of the Joint Industry Contract Committee, whose members drafted PWC, certainly threw light on the language of the agreement. Since PWC was claimed to be ambiguous, all of this evidence was certainly admissible. *Tennessee Consol. Coal Co. v. UMW*, 416 F.2d 1192 (6th Cir. 1969), *cert. denied*, 397 U.S. 964 (1970).

Although the Court stated that it "can envision no injustice in declining to reopen the trial," it is clear that the trial was already reopened and that a real injustice has been done to the plaintiffs by the denial of a hearing and the exclusion of the new evidence. The new documents provided more than a preponderance of evidence that the union had conspired with the operators to violate the antitrust laws.

The Court concluded its opinion by adopting its former opinion reported at 265 F. Supp. 388 (E.D. Tenn. 1967), except as modified. The judgment entered on this prior opinion was vacated by this Court.

We do not understand the majority's view that the new evidence which was rejected by the District [fol. 32] Court, does not change the balance of the case; nor do we agree with its alternative, that if the exclusion was erroneous such error was harmless under Rule 61, Fed. R. Civ. P.[2] Such rejection deprived the plaintiffs of their due process rights.

In a case where, as here, the majority opinion admits that the factual issues are close, the Court should have welcomed the offering of additional evidence. Even though

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[2] This statement of harmless error would seem to conflict with the language on page 19 of the majority opinion, that "It seems clear to us that the record in this case is one where the factual issues are close."

It will be recalled that the same District Judge presided at the trial of the case of **Tennessee Consol. Coal Co. v. UMW**, 416 F.2d 1192 (6th Cir. 1969), **cert. denied**, 397 U.S. 964 (1970). That case involved facts virtually identical with the facts in the case at bar, and was submitted to a jury which returned a verdict in favor of the plaintiff for $977,500. The District Court ordered a remittitur of $500,000, and then trebled the balance, entering judgment in favor of Tennessee Coal for $1,432,500, and in favor of Grundy, a co-plaintiff, for $67,500. The Court also allowed attorneys' fees of $150,000 to counsel for plaintiffs.

If the majority's alternative is correct, it would have been the duty of the District Court in the **Tennessee Coal** case to set aside the verdict and dismiss the complaint.

part of such evidence was cumulative, it certainly strongly supported the evidence which was in the old record, at least to cause such additional evidence to preponderate in favor of the plaintiffs.

The majority relies on *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 331 (1971); *Swartz v. New York Central R. R.*, 323 F.2d 713, 714 (7th Cir. 1963); and *Locklin v. Switzer Bros. Inc.*, 299 F.2d 160, 169-170 (9th Cir. 1961), *cert. denied*, 369 U.S. 861 (1962). Such reliance is misplaced. *Zenith* involved a motion to amend the complaint and to offer additional evidence during the course of a trial, which motion the District Court denied on the ground that it would operate to prejudice Zenith. *Swartz* involved a motion to reopen after plaintiff had rested his case and without making any tender of specific new evidence. *Locklin* involved the offering of new evidence in a post-trial proceeding which the Court denied. None of these cases involved the construction of a remand order of an appellate court, or the right to offer [fol. 33] new evidence when an appellate court had vacated the judgment of the District Court, leaving only a pending case.

## THE CLEARLY ERRONEOUS RULE

The majority, quoting extensively from the en banc opinion, which lacked approval by a majority of the Court, and from the initial opinion of the District Court (judgments entered on both of which were reversed on other grounds by the Supreme Court), applies the clearly erroneous rule to the findings of fact made by the District Court in 1972 on evidence offered at the trial in 1965. As will be pointed out, the clearly erroneous rule has no application here and it is error to apply it.

The District Judge would have to have had a miraculous memory to recall the evidence and the credibility of witnesses throughout that protracted trial of seven years ago. It is obvious that the Court was required to and did refresh its recollection by examination of the many printed volumes of appendices and the multitude of exhibits. Whether the District Judge in 1972 could have recalled also the manner and demeanor of the witnesses as they appeared before him in 1965, when he was applying an erroneous standard of proof, is open to serious question.

During the many weeks of protracted trial which took place in 1965, the District Judge had ample opportunity to see and observe the witnesses, to hear them testify, and to determine their credibility. While the matter presumably was fresh in his mind he prepared his fifty-page opinion, in which he made the following finding of fact:

> "Were this case being tried upon the usual preponderance of the evidence rule applicable to civil cases, the Court would conclude that UMW did so impliedly agree." *Ramsey v. UMW*, 265 F. Supp. at 412 (1967).

[fol. 34] In the en banc court, Judge O'Sullivan, who wrote the opinion for the four dissenting Judges, which opinion the Supreme Court upheld on the clear proof issue, stated:

> "Judge Wilson specifically found that, *by preponderance of the evidence*, plaintiffs had established that the joint action of the BCOA and the Mine Workers in entering into and using the National Bituminous Coal Wage agreement with its Protective Wage Clause, and the implementing of them, established an agreement violating the Sherman Act. While he did not express himself as to how he would have found as to all of the other issues

of fact had he adhered to the traditional preponderance of evidence rule, he made it plain that he followed the 'clear proof' rule in passing on responsibility for violent conduct by agents or members of the union." (416 F.2d at 674).

Mr. Justice White, who wrote the opinion for the Supreme Court, referred to this finding of the District Court as follows:

"As for an implied conspiracy to standardize employment terms throughout the industry aimed at destroying marginal producers, the trial court said that '[w]ere this case being tried upon the usual preponderance of the evidence rule applicable to civil cases, the Court would conclude that the U.M.W. did so impliedly agree,' but that 'the standard of proof where a labor union is involved is "clear proof," as required by Section 6 of the Norris-LaGuardia Act, a standard different from the ordinary civil burden of persuasion.' 265 F. Supp. at 412. Judged by this stricter standard, proof of conspiracy was found wanting and the case against the Union failed." (Footnotes omitted.) (401 U.S. at 306).

Now after the lapse of seven years, on reviewing a cold record the District Judge, in his second opinion changes his mind and tells us that his finding of fact on the preponderance issue, on which both this Court and the Supreme Court relied and clearly understood, was only dictum. He explained it as follows:

[fol. 35] "In its original opinion the Court in what it deemed to be *dictum* concluded that the preponderance rule would favor an inference that the PWC did by implication what it had not expressly done. The

Court was motivated to such a finding by three considerations. One consideration was that thereafter the UMW did in fact negotiate contracts only upon the wage and labor standards set in the National Contract. Another consideration was that BCOA and its members did have a competitive motive, as evidenced by the PWC itself and its administration, to seek such a result. A third consideration was that complaints were in fact registered with UMW by signatory operators from time to time regarding the competitive advantage of non-signatory operators." (Emphasis added.) (344 F. Supp. at 1037).

It does appear to be somewhat of a coincidence that in the Supreme Court UMW claimed that the District Judge's holding on the clear proof issue was mere dictum. The Supreme Court disposed of this frivolous claim of the Union, as follows:

"Here the Union's claim is belied by the language of the trial court's opinion and its interpretation by the eight judges of the Court of Appeals. The second proposition—that the trial court's clear-evidence ruling was mere dictum—leaves unexplained the Court of Appeals' affirmance by an equally divided court as well as the trial judge's remarks that he would or might have reached different results on some issues, apparently including some aspects of the conspiracy issue, if preponderance of the evidence was the governing standard. To what extent the proof would fail under the standard we here hold applicable and what legal difference it might make are matters open to be dealt with on remand. We do note from the trial court's opinion that except for violence and some picketing, issues of union responsibility for acts alleged and proved

were nonexistent or played little part in the thinking of the trial judge." (401 U.S. at 308, n. 5).

[fol. 36] Because of the lapse of seven years' time between the date of the trial and the second opinion of the District Judge, and his necessity of re-examination of the record, and because the original record consisted of over 5,600 pages and 450 exhibits (and the supplemental record is likewise voluminous), we regard it now as essentially a "paper case," where the clearly erroneous test of Rule 52(a) of the Federal Rules of Civil Procedure is inapplicable. *United States v. General Motors Corp.*, 384 U.S. 127 at 141 (1966); *In Re Clemens*, 472 F.2d 939, 941, n. 1 (6th Cir. 1972).

In any event, the ultimate conclusion of the District Judge is not shielded by the clearly erronous rule.

In *United States v. General Motors*, *supra*, the Court said:

> "We note that, as in *United States v. Parke, Davis & Co.*, 362 U.S. 29, 44-45, the ultimate conclusion by the trial judge, that the defendants' conduct did not constitute a combination or conspiracy in violation of the Sherman Act, is not to be shielded by the 'clearly erroneous' test embodied in Rule 52(a) of the Federal Rules of Civil Procedure." (384 U.S. at 141, n. 16).

## THE SECOND OPINION OF THE DISTRICT COURT

The District Court stated in more than one place that there was no *direct* evidence of a conspiracy. It is submitted that this is true in most conspiracy cases. The conspiracy, ordinarily, must be shown by circumstantial evidence. The present case, however, comes as close

as any case we have ever read, as establishing an express agreement.

The Protective Wage Clause provides in Paragraph "A" of the agreement of UMW, as follows:

> "A. During the period of this Contract, the United Mine Workers of America will not enter into, be a party to, nor will it permit any agreement or understanding covering any wages, hours or other conditions of work applicable to employees covered by this Contract on any basis other than those specified in this Contract or any applicable District Contract. The United [fol. 37] Mine Workers of America will diligently perform and enforce without discrimination or favor the conditions of this paragraph and all other terms and conditions of this Contract and will use and exercise its continuing best efforts to obtain full compliance therewith by each and all the parties signatory thereto."

BCOA requested this paragraph. 265 F. Supp. 410.

If this language means anything, it is clear that UMW has bound itself not to enter into any agreement and not to be a party to any agreement or understanding covering wages, hours and working conditions on any basis other than as specified in this contract.

In Paragraph "B" of PWC the signatory operators agree to boycott coal not produced in accord with the National Agreement.

In Paragraphs "C" and "E" a "Joint Industry Contract Committee" and "Joint District Contract Committee" are set up to act as tribunals to try UMW or any operator for violation of the provisions of PWC.

We note that the District Court has construed Paragraph "A" of PWC as binding UMW to insist on identical terms against only "signatories." Paragraph "A" does not so state, but on the contrary it clearly prevents UMW from entering into any agreement or even understanding on any basis other than those specified therein. To construe it otherwise tortures its plain language. The District Judge further found that after PWC, "UMW did in fact negotiate contracts only upon the wage and labor standards set in the National Contract." 344 F. Supp. 1037. The plain language of PWC required UMW to do exactly that.

The Court further found "that BCOA and its members did have a competitive motive, as evidenced by PWC itself and its administration, to seek such a result." 344 F. Supp. 1037.

These findings of the District Court not only do not support its ultimate conclusion of no agreement, [fol. 38] but require a result opposite that reached by the District Court. The findings are clear that the parties to PWC, the union and the big operators, construed PWC as requiring the union not to enter into any agreement with other operators except on identical terms with the National Contract.

After stating again that there was no direct evidence of conspiracy, the District Court was impressed by the fact that the officials of UMW and the big operators, in their testimony, denied that they conspired. It could hardly be expected that they would do otherwise. In any event, the acts of the officials of UMW and the big operators speak much louder than their words.

The District Judge further stated that "the motives of UMW and BCOA appear to have coincided," but he was of

the view that a "coincidence of motives does not of itself connote a Sherman Act conspiracy ...." 344 F. Supp. 1038, 1039. While these motives may not constitute a conspiracy per se, they do constitute strong and persuasive evidence which, when considered along with the other written and oral evidence in the case, clearly establish the agreement.

The District Court appears to have been influenced by the fact that the activities of the union, which the Court graphically portrayed as including mass picketing, violence and bloodshed, would not have violated the Sherman Act if the union had acted unilaterally. But the fact is that UMW did not act unilaterally. It acted as it was required to act under the agreement with the big operators, each one aiding and abetting the other. The agreement provided even for methods of enforcing compliance therewith, by each party. These activities put the marginal operators out of business, as they could not operate under the onerous terms of the National Contract.

In *Allen Bradley Co. v. Local Union, Bhd. Elec. Workers*, 325 U.S. 797 (1945), the Court held that the Sherman Act was violated when unions "aid non-labor groups to create business monopolies and to control the marketing of goods and services."

[fol. 39] The closing paragraph of the majority opinion of the Supreme Court in the present case states:

> "Where a union, by agreement with one set of employers, insists on maintaining in other bargaining units specified wage standards ruinous to the business of those employers, it is liable under the antitrust laws for the damages caused by its agreed-upon conduct." (401 U.S. at 313).

The District Court stated that plaintiffs' contention that PWC constituted an express commitment in violation of the antitrust laws was "self-defeating," apparently on the theory that plaintiffs were signatories thereto and would be in pari delicto. Taking into account the acts of the union which compelled plaintiffs and other operators to sign, and the efforts of plaintiffs to get out from under the contract, this defense does not hold water. UMW did not raise this defense and it was not considered in the prior appeal in this Court, nor in the Supreme Court. We do not know why the District Court raised it. It would seem to be against public policy to permit such a defense in this type of action. *Cf.*, *South-East Coal Co. v. Consolidated Coal Co.*, 434 F.2d 767, 783-784 (6th Cir. 1970).

Judge O'Sullivan, who wrote the opinion for the four dissenting Judges in the prior appeal (which the Supreme Court affirmed on the clear proof issue), aptly described the manner in which PWC was implemented by UMW and the big operators. He stated:

> "Plaintiffs' evidence in this case generously portrayed how propitious was the setting for the victory achieved by the BCOA and the Mine Workers in implementing their agreement. The District Court opinion at length sets out the relevant facts. Among other things, it was shown that the Mine Workers loaned to one Cyrus Eaton some $25,000,000 to enable him to acquire *for them* control of the capital shares of West Kentucky Coal Company—the biggest of the members of BCOA—and its subsidiary, Nashville Coal [fol. 40] Company. By having Eaton so invest the union's money, the Mine Workers acquired the voting rights of West Kentucky Coal Company and Eaton became Chairman of the Board, and:

'Immediately after Mr. Eaton assumed control, West Kentucky signed the National Bituminous Coal Wage Agreement, the first time in its history that it had signed a contract with the U.M.W.' 265 F. Supp. 414.

Judge Wilson further observed:

'Furthermore, the reasons for which loans and investments were made in West Kentucky and its subsidiary, Nashville Coal Company, must likewise largely be inferred, *as the reasons given by the U. M. W. for doing so will not bear scrutiny.*' 265 F. Supp. at 414. (Emphasis supplied.)

"It would indeed be over kind to accord credence to the asserted claim that the making of the National Bituminous Coal Wage Agreement and the Protective Wage Clause between the United Mine Workers and their controlled West Kentucky Coal Company was an 'arm's length' transaction, free of conspiratorial and predatory purpose. The Mine Workers lost eight of the twenty-five million dollars which it invested in the management side of the accused transactions. For its victory, it was apparently willing to pay this bill as well as the many hundreds of thousands of dollars which it paid for the depredations and violence—the reign of terror—which it employed in driving out of coal mining those who could not live with the terms of the National Bituminous Wage Agreement. See Flame Coal Co. v. United Mine Workers, 303 F.2d 39 (6th Cir. 1962); United Mine Workers of America v. Osborne Milling Co., 279 F.2d 716 (6th Cir. 1960), cert. denied, 364 U.S. 881, 81 S. Ct. 169, 5 L. Ed. 2d 103 (1960); Gilchrist v. United Mine Workers, 290 F.2d

36 (6th Cir. 1961). District Judge Wilson described the Mine Workers' conduct in this language:

[fol. 41] "The evidence in this case reflects once again that the 'history of the bituminous coal industry is written in blood as well as ink.' Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 60 S. Ct. 907, 84 L. Ed. 1263.' 265 F. Supp. at 428.

and further,

> 'A great deal of violence, bloodshed and destruction of property has accompanied the strike [discussed in the opinion]. Much suffering, deprivation and want has occurred. The Southeastern Tennessee coal field remains a blighted area.' 265 F. Supp. at 428.

He sums up the situation as follows:

> 'In the period since 1960 the coal operators in the Southeastern Tennessee coal field have been unable to compete and survive in the T.V.A. coal market under the National Bituminous Coal Wage Agreement. While in many instances this appears to have been due to antiquated mining methods and equipment or other causes, the fact nevertheless remains that since 1960 there has not been a single instance of a successful coal mining operation in the Southeastern Tennessee coal field under the National Bituminous Coal Wage Agreement and this in spite of the fact that the ***only feasible alternative facing most coal operators in the area was to operate under the national contract or go out of business.***' 265 F. Supp. at 430. (Emphasis supplied.)

"There is nothing in the record of this case to suggest that the conception and prosecution of the grand

plan we deal with was the work of irresponsible underlings. The total enterprise was directed from high echelons of authority. Top people of the United Mine Workers and the Bituminous Coal Operators Association did not need the protection of Norris-LeGuardia when they negotiated and signed the National Bituminous Coal Wage Agreement and its Protective Wage Clause, nor when the Mine Workers invested $25,000,000 to aid the big coal companies to fulfill the promise of the plan.

[fol. 42] "Peace has indeed come to Southeastern Tennessee's part of Appalachia, but it is the peace of obedience to the overlords of big business and big labor. Of this situation, Mr. Justice Douglas, in his *Pennington* concurrence, appropriately observes:

> 'Congress can design an oligopoly for our society, if it chooses. But business alone cannot do so as long as the antitrust laws are enforced. Nor should business and labor working hand-in-hand be allowed to make that basic change in the design of our so-called free enterprise system.' 381 U.S. at 674, 85 S. Ct. at 1595-96." (416 F.2d at 675-676).

From the foregoing, it is clear that the District Court did not comply with the mandate of this Court, nor with that of the Supreme Court. Because of the grievous errors heretofore pointed out, the judgment of the District Court should be reversed and the case remanded with instructions to admit the tendered evidence and to determine the case anew on the basis of the old record plus any additional relevant evidence which any of the parties may offer. In the event that UMW does not offer additional evidence compelling a conclusion different from that reached in this dissenting opinion, the Court should find in favor of the plaintiffs and assess damages.

## APPENDIX B

**UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF TENNESSEE**
**SOUTHERN DIVISION**

GEORGE RAMSEY, et al.,
*Plaintiffs*,

v.

UNITED MINE WORKERS
OF AMERICA,
*Defendant*.

Civil Action No. 3667

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TENNESSEE PRODUCTS AND
CHEMICAL CORPORATION,
*Plaintiff*,

v.

UNITED MINE WORKERS
OF AMERICA,
*Defendant*.

Civil Action No. 4189

[fol. 1]

### OPINION

(Filed June 30, 1972)

In these lawsuits a number of coal operators in the Southeastern Tennessee coal fields seek to recover damages of the United Mine Workers of America for alleged violations of the antitrust laws of the United States. The cases were tried several years past by this Court sitting

without a jury. The trial, extending over a period of weeks, accumulated a very extensive record, consisting of more than 5600 pages of testimony and more than 450 exhibits, many of the exhibits themselves being quite voluminous. After having the benefit of extensive briefs, the Court entered its opinion, which opinion is set forth in some 50 pages of the *Federal Supplement* and in which the Court concluded that the evidence failed to establish a Sherman Act violation on the part of the defendant. *Ramsey v. United Mine Workers of America*, 265 F. Supp. 388 (1967). In line with the provisions of Section 6 of the Norris-LaGuardia Act (29 U.S.C. §106) and in line with what it believed to be the controlling authority in the cases of *United Mine Workers of America v. Pennington*, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965), and *United Mine Workers of America v. Gibbs*, 383 U.S. 716, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966), this Court applied the "clear proof" standard in weighing all matters in issue. Upon appeal the application of this standard of proof was affirmed by an equally divided Court of Appeals sitting en banc, and the decision of this Court in denying recovery was affirmed. *Ramsey v. United Mine Workers of America*, 416 F.2d 655 (6th Cir., 1969). The United States Supreme Court granted certiorari and a divided court concluded that the clear proof standard required by Section 6 of the Norris-LaGuardia Act had application only to certain issues with the remaining issues to be weighed in accordance with the usual preponderance of the evidence rule generally applicable to civil lawsuits. *Ramsey v. United Mine Workers*, 401 U.S. 302, 91 S. Ct. 658, 28 L. Ed. 2d 64 (1971). The case was accordingly remanded for further consideration by this Court in light of the Supreme Court opinion. Upon remand the plaintiffs have moved to be allowed to reopen the proof and submit addi-

tional evidence. Briefs have been filed both upon the remand and upon the plaintiffs' motion to reopen the proof. The case is accordingly now before the Court upon the remand from the Supreme Court and upon the plaintiffs' motion to be allowed to reopen the proof. The necessity for or the propriety of reopening the proof can better be judged following some analysis of the legal and factual issues involved in this remand.

Since the remand of the case, the Court has undertaken a full review of the record upon the trial of the case, has re-studied the original trial briefs of the parties as well as the briefs filed upon this remand. The Court has likewise carefully read and considered the evidence submitted upon the plaintiffs' offer of proof in support of their motion to reopen the evidence.

Without commenting at this point upon the inferences that may have been drawn from proven facts, nothing in this re-study of the record has revealed unto the Court any error in the statement of proven facts as set forth in its former opinion in 265 F. Supp. 388. Rather, the Court remains of the view that the facts, other than those to be inferred, and other than as may be supplemented herein, are correctly set forth in its former opinion. That opinion will accordingly be adopted by the Court except as it may be expressly corrected or supplemented in this opinion. Before commenting further upon the factual record, certain comments upon the law are in order.

[fol. 3] *Legal Guidelines*

In its original opinion this Court set forth the legal guidelines by which its decision must be governed (265 F. Supp. 388 at 395-400). A review of those legal guide-

lines in light of the subsequent appellate review of this case would reveal but two areas in which additional comments or corrective statements need be made. A corrective statement will need to be made in regard to the standard of proof to be applied in the case. Further comment will be in order in regard to the need or lack of need for proof of predatory intent, or the applicability of the per se rule, in a case of this nature.

In its former opinion, relying upon *United Mine Workers v. Pennington*, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965), and *United Mine Workers v. Gibbs*, 383 U.S. 716, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966), this Court had the following to say regarding the burden of proof:

> "One further subject needs to be given attention here and that is the standard of proof that must govern a proceeding involving a Sherman Act charge against a labor union. The burden of proof borne by the plaintiff is not the usual preponderance of the evidence rule applicable in civil cases generally. The requirement imposed by Section 6 of the Norris-LaGuardia Act is that of 'clear proof' where a labor organization is a party to an action such as this. (29 U.S.C. §106)"

This statement has now been held to be in error insofar as it interpreted Section 6 of the Norris-LaGuardia Act as requiring clear proof of all issues rather than clear proof of a labor union's authorization, participation in, or ratification of acts allegedly performed upon its behalf, with the usual preponderance of the evidence rule applying to all other issues. The rule to be applied is stated thusly in *Ramsey v. United Mine Workers*, 401 U.S. 302 at 311:

> "In our view Section 6 requires clear and convincing evidence only as to the union's authorization, par-

ticipation in or ratification of the acts allegedly performed on its behalf. Nor do we discern any
[fol. 4] basis for our fashioning a new standard of proof applicable in antitrust actions against labor unions. Accordingly the district court erred in requiring petitioners' compliance with the standard of Section 6 in proving other elements of their treble-damage case against the Union."

In line with this statement the Court must accordingly reconsider and reweigh each element of the evidence, applying the appropriate standard of proof to that element.

Before leaving the statement of legal guidelines as set forth in this Court's original opinion, some further comment is in order regarding the need or lack of need for proof of predatory intent before a labor union may be held liable for participation in a conspiracy under the Federal Antitrust Laws. This matter was discussed by this Court in its former opinion, but it was there pointed out that some lack of clarity existed because of the differences expressed on the subject in the three opinions filed in the *Pennington* case with no one opinion having the support of a majority of the Court. Both the District Court (257 F. Supp. 815 at 829) and the Court of Appeals (400 F.2d 806 at 814) upon retrial of the *Pennington* case interpreted the Supreme Court decision in that case as requiring proof of predatory intent.

These matters are now clarified by the following language from the opinion of Justice White in the *Ramsey* case, which opinion secured the concurrence of a majority of the Court:

"Finally, petitioners in effect ask us to reconsider our holding in *Pennington* and other cases that under the

Clayton and Norris-LaGuardia Acts the Union incurs no liability under the antitrust laws when it concludes 'a wage agreement with the multi-employer bargaining unit ... and ... as a matter of its own policy, and not by agreement with all or part of the employers of that unit, seek[s] the same wages from other employers.' 381 U.S., at 664, 14 L. Ed. 2d at 633. This we decline to do. The Court made it unmistakably clear in *Allen Bradley Co. v. Union*, 325 U.S. 797, 811, 89 L. Ed. 1939, 1949, 65 S. Ct. 1533 (1945), that unilateral conduct by a union of the type protected by the Clayton and Norris-LaGuardia Acts does not violate the Sherman Act even though it may also restrain trade. '[T]hese congressionally permitted union activities may restrain trade in and of themselves. There is no denying the fact that many of them do so, both directly and indirectly.' But 'the desirability of such an exemption of labor unions is a question for the determination of Congress.'- 325 U.S., at 810, 89 L. Ed. at 1949. We adhere to this view. But neither do we retreat from the 'one line which we can draw with assurance that we follow the congressional purpose. We know that Congress feared the concentrated power of business organizations to dominate markets and prices. ... A business monopoly is no less such because a union participates, and such participation is a violation of the Act.' Id., at 811, 89 L. Ed. at 1949. Hence we also adhere to the decision in *Pennington*: [T]he relevant labor and antitrust policies compel us to conclude that the alleged agreement between UMW and the large operators to secure uniform labor standards throughout the industry, if proved, was not exempt from the antitrust laws.' 381 U.S., at 669, 14 L. Ed. at 635. *Where a union, by agreement with one set of*

***employers, insists on maintaining in other bargaining units specified wage standards ruinous to the business of those employers, it is liable under the antitrust laws for the damages caused by its agreed-upon conduct."*** (Emphasis supplied)

The foregoing language to which emphasis has been added would appear to have eliminated any need for proof of predatory intent, and to have established a per se rule of labor union antitrust liability where it is made to appear by a proper standard of proof that the Union has agreed with one or more employers to maintain specified wage standards in negotiations with other employers and where such wage standards are shown to be ruinous to the business of the other employers. Since conspiracy is the basis of such liability, the same rule of antitrust liability would apply to all employers participating in the agreement.

*Protective Wage Clause*

Having carefully reviewed its former opinion in this case in light of the directions given upon remand and in light of the present record in the case, the Court deems it appropriate to consider further only that portion of its former opinion dealing with the Protective Wage Clause (265 F. Supp. 388 at 410-412) and the portion setting forth the ultimate conclusions of the Court in light of all of the evidence when viewed as a whole (265 F. Supp. 388 at 431 et seq.). With respect to all other portions of its former opinion, the Court now concludes that its findings therein are correct and in accordance with the record, whether that record be viewed in light of the preponderance rule or in light of the clear proof rule.

[fol. 6]

With regard to the Protective Wage Clause (PWC), the plaintiffs reassert their former contention, namely that, as negotiated between the United Mine Workers (UMW) and the Bituminous Coal Operators Association (BCOA) in 1958 and inserted in the National Bituminous Coal Wage Agreement in that year, the PWC, upon proper construction, was an illegal bargain struck between the BCOA and the UMW wherein the latter expressly agreed to impose the wage and labor standards negotiated with the BCOA upon all other coal operators with whom it might in the future negotiate, thereby stripping the UMW of its freedom to bargain and its labor union exemption under the antitrust laws. These matters were carefully considered by the Court in its former opinion. The conclusion was there reached that the PWC was limited to signatories only and did not commit or limit the Union in its bargaining with non-signatory coal operators (265 F. Supp. 388 at 412). Not only was this conclusion approved upon appeal in this case (416 F.2d 655 at 657), but the same conclusion was arrived at by both the trial court and the Court of Appeals in the case of *Lewis v. Pennington*, 257 F. Supp. 815 at 862, affirmed 400 F.2d 806 at 814.

The plaintiffs have approached the PWC from a somewhat new theory in their presentation upon remand. That theory is that the PWC would by its express terms limit the UMW in its future negotiations with all previous signatories of the National Agreement, thereby removing its exemption from the antitrust laws as a labor union, at least as to previous signatories.

[fol. 7]

Some, if not all, of the plaintiffs herein were such previous signatories. The difficulty with this position is the same as with the plaintiffs' previously stated position, and that is that the PWC refers neither to future

previous signatories, but rather refers to "signatory operators" and to "employees covered by this contract." The conclusion must accordingly be the same as was reached in the former opinion, namely that the PWC did not constitute an express commitment upon the part of the UMW to bargain with other coal operators only upon terms set forth in the contract made with the BCOA.

It may properly be noted here that nothing in the new evidence tendered in support of the plaintiffs' motion to reopen the proof would tend to alter this construction of the terms of the PWC. It may likewise be noted that the plaintiffs' contention that the PWC constituted an express commitment in violation of the antitrust laws would appear to be partially self-defeating in that most, if not all, of the plaintiffs were themselves parties to that agreement until December of 1962.

There remains to reconsider the Court's conclusion in its former opinion that the evidence likewise failed to establish an implied or secret agreement between the BCOA and the UMW whereby the latter agreed to impose the National Contract negotiated with the BCOA upon all other coal operators with whom it might engage in collective bargaining. This conclusion was reached by the Court upon the assumption that such an implied or secret agreement must have been established by clear proof. Such clear proof was found to be lacking in the case. The defendant now contends that no review or modification of this finding would be in order under the Supreme Court's remand, as clear proof remains the standard by which the UMW's "authorization, participation in, or ratification of" such an agreement must be established.

[fol. 8] This position would not appear tenable. While it is true that Justice White in his majority

opinion for the Court stated: "In our view Section 6 requires clear and convincing evidence only as to the union's authorization, participation in, or ratification of the acts allegedly performed upon its behalf," the opinion likewise expressly stated: "The section neither expressly nor by implication requires satisfaction of the clear-proof standard in deciding factual issues concerning the commission vel non of acts by union officers or by members alleged to constitute a conspiracy ..." Whatever "act" may require clear and convincing proof under Section 6 of the Norris-LaGuardia Act as interpreted by the Supreme Court, it is clear that they do not include acts of union officers or union members in engaging in an antitrust conspiracy, secret or otherwise. There being no issue in this case but that John L. Lewis and other officers representing the UMW in all of the relevant negotiations with the BCOA were authorized representatives of the Union, this Court must accordingly weigh the evidence as it relates to the existence or non-existence of an implied or secret conspiracy between the Union and the BCOA in accordance with the preponderance of the evidence normally applicable to civil antitrust lawsuits.

In this regard it must be noted that at one point in its former opinion this Court, in referring to the existence or non-existence of an implied conspiracy, stated: "Were this case being tried upon the usual preponderance of the evidence rule applicable to civil cases, the Court would conclude that the UMW did so impliedly agree" (265 F. Supp. 388 at 412). As appears from the opinion, this conclusion was stated by the Court in connection with the discussion of the PWC and at a time when the Court was in fact weighing the evidence under the clear proof rule and not under the preponderance rule. It is
[fol. 9] accordingly proper that the Court should recon-

sider its previously stated conclusion with a view to determining whether it is justified when the evidence is carefully considered in light of the preponderance standard of proof. Such a reconsideration is further required by an apparently conflicting conclusion arrived at by the Court in the concluding portion of its former opinion wherein the Court stated:

> "While many inferences favorable to the plaintiffs' contentions can reasonably be drawn from the evidence, in every instance a no less equally reasonable inference can be drawn to the contrary. The latter, when coupled with the positive denial of many witnesses of any conspiracy, as well as other inferences favorable only to the defendant's contention, do not permit a finding based upon clear proof of an antitrust conspiracy." (265 F. Supp. 388 at 432)

Apart from the plaintiff's contentions regarding the Protective Wage Clause and as hereinabove considered, there is no direct evidence in the record of a conspiratorial agreement between the UMW and the BCOA. As reflected by the record, every witness having personal knowledge of the negotiations and dealings between the UMW and the BCOA denied the existence of any agreement, secret or otherwise, wherein the Union conspired or committed itself to impose the wage and labor standards negotiated with the BCOA upon coal operators who were not members of the BCOA or who were not signatories to the contract negotiated with the BCOA. Making this denial were every officer and representative of the Union and every officer and representative of the BCOA who testified at the trial. Among the evidence now sought to be newly offered by the plaintiffs is the testimony of Mr. Moody. Even Mr. Moody, who as President of the Southern Coal Operators

Association from 1946 to 1960 represented competitors of the BCOA in negotiations with the UMW, vehemently denies any such conspiracy. The statement in its former opinion that: "Every officer of the Union who [fol. 10] testified, as well as every representative from the Coal Industry alleged to be in on the conspiracy, denied its existence." (265 F. Supp. 388 at 432) remains a correct statement.

Accordingly, if a conspiracy is to be found, it must be found in the reasonable inferences to be drawn from proven facts. That is, it must be inferred from the evidence.

The Court in its former opinion considered the various inferences that might be drawn from the various facts proven in the case. For example, the circumstances leading up to the 1950 National Contract and the changes that occurred at that time in the negotiating pattern followed by the Union are believed to be fully and correctly stated in the Court's previous opinion. The plaintiffs both then and now would have the Court infer from this evidence the beginning of an anticompetitive conspiracy between the Union and the major coal operators. The Court, however, has previously concluded:

> "The Court can only say that upon the evidence to this point, it can discern no evidence of an incipient Sherman Act conspiracy. Certainly the testimony of the principal negotiators for both the Union and the operators is emphatic to the contrary. To conclude inferentially otherwise on the basis of the wage scale negotiated is to engage in unwarranted speculation and is to disregard the undeniable right of the Union to seek to gear its wage scale to the ability to pay of the soundly solvent and not the marginal producer ... The circum-

stances of the negotiations as outlined above give no support in reason to such a conspiratorial inference. Rather quite to the contrary." (265 F. Supp. 388 at 406 & 407)

Having now reconsidered the record under the preponderance rule, the Court can see no reason for altering these findings or conclusions.

Likewise, after recounting the evidence regarding the formation of the BCOA, the collective bargaining that occurred between 1950 and 1958 and the changes that occurred in the industry in these years, including the move to mechanization, the Court had these things to say:

[fol. 11] "That these more peaceful procedures support a Sherman Act conspiracy, however, is not reasonably to be inferred ... The economic pressure created by technological advances and the competition engendered thereby do not equate to a Sherman Act violation ... The Court being unable to infer any Sherman Act conspiracy from the record to this point, these matters must accordingly be considered subsequently in the light of the total record." (265 F. Supp. 388 at 408, 409 & 410).

Again, having reconsidered the record under the preponderance rule, the Court can see no reason for altering these findings or conclusions.

Passing for the moment the former discussion of the Protective Wage Clause and turning to the evidence regarding the UMW's investments in the West Kentucky Coal Company and the activities of that Coal Company upon the TVA market, the Court again finds its former statement of the facts to be in accord with the record when viewed in the light of the preponderance rule. The Court there stated:

"The Court concludes that the evidence fails to establish that West Kentucky Coal Company or its subsidiary, Nashville Coal Company, engaged in predatory pricing of coal upon the TVA market. It rather appears that West Kentucky and Nashville based their prices upon legitimate business considerations and were attempting at all times to meet the competition rather than lead the market downward. Having so concluded, it becomes unnecessary to consider further the responsibility of the UMW, if any, for West Kentucky and Nashville's coal pricing policies." (265 F. Supp. 388 at 422)

Likewise, the Court has again reviewed the record and its former findings as they relate to the Southeastern Tennessee coal field and the actions of the UMW regarding the plaintiffs in that coal field. After reciting the facts, the Court concluded:

"Upon this record the UMW could not be held chargeable for violence, even were the standard of proof required that of a usual civil case ... Clear proof does not appear, either directly or by inference, that the UMW acted other than unilaterally in furtherance of its own interests and purposes in its activities in the Southeastern Tennessee coal field in the period here under review." (265 F. Supp. 388 at 429-430)

[fol. 12] The former statement of facts is believed upon review to be correct. Although the conclusion reached was weighed upon the clear proof scale, upon reweighing upon the preponderance scale the Court now arrives at the same conclusions.

There remains to consider the inferences to be drawn from the PWC as well as the inferences to be drawn when

considering the record as a whole rather than in its component parts.

As previously found, the PWC did not by its terms commit the UMW to impose the wage and labor standards negotiated with the BCOA upon other coal operators with whom it might deal in the future. Did it by implication do that which it has been found not to have expressly done? Wherein does the evidence preponderate on this issue?

In its original opinion the Court in what it deemed to be dictum concluded that the preponderance rule would favor an inference that the PWC did by implication what it had not expressly done. The Court was motivated to such a finding by three considerations. One consideration was that thereafter the UMW did in fact negotiate contracts only upon the wage and labor standards set in the National Contract. Another consideration was that BCOA and its members did have a competitive motive, as evidenced by the PWC itself and its administration, to seek such a result. A third consideration was that complaints were in fact registered with UMW by signatory operators from time to time regarding the competitive advantage of non-signatory operators.

While each of these considerations remain persuasive with the Court, a careful review of the record would reveal other conflicting but equally persuasive considerations. While it is true that the UMW negotiated only upon the basis of the National Contract after the PWC was placed in the contract in 1958, it is also true that long [fol. 13] prior to 1958, in fact ever since 1941, the Union had negotiated all contracts on the same flat across-the-board wage increases. Although wage differentials between northern and southern operators had been negotiated prior to 1941, it was the stated purpose of the

Union from its inception to establish uniform wage and labor standards. As previously noted by the Court, "It appears clear from the evidence that national uniformity in wage rates and labor standards in the coal industry has been a consistent policy and goal of the UMW since its inception in 1890." 265 F. Supp. 388 at 404. A union is always in competition with non-union labor. It is apparent that the wage differentials negotiated prior to 1941 had the effect of placing the Union in competition with itself and that the Union sought consistently to avoid or eliminate these differentials.

As regards any inference to be drawn from a competitive motive on the part of BCOA, upon further reflection it is apparent that in a competitive economy a competitive motive will be universal to all coal producers. To draw an inference of antitrust conspiracy from this motive would be somewhat of an anomaly.

Finally, as regards the inference to be drawn from the registering of complaints of competitive disadvantage with the UMW by contract signatories, it is apparent that complaints of coal operators of competitive disadvantage were universal in their origin and included the plaintiffs themselves. Perhaps one operator best summed up the attitudes of all operators when at a bargaining session he stated: "All I want is a fair advantage." Collective bargaining inevitably involves the discussion of the competitive effect of wage and labor standards.

Although at the time the Court was weighing the inferences to be drawn from the PWC under the clear proof test it indicated a different result might follow were the preponderance rule to be applied, it is apparent upon careful review that the inferences to be drawn from the PWC are as consistent with unilateral

[fol. 14]

action as they are with conspiratorial action and leave the Court to speculate in making the choice. Where equal inferences can be drawn and the Court is left to speculate, the plaintiffs have failed to carry their burden of proof. *Southeast Coal Co. v. Consolidation Coal Co.*, 434 F.2d 767 (6th Cir., 1970).

*Motion to Reopen Proof*

Before undertaking a reconsideration of the evidence as a whole, as distinguished from its component parts as the Court has done to this point, it is appropriate that the Court should consider plaintiffs' motion to be allowed to reopen the proof in this case. In support of their motion the plaintiffs have made an offer of proof which consists of (1) the Minutes of the Joint Industry Contract Committee relating to the administration of the PWC by that Committee; (2) the deposition of Joseph E. Moody, President of the Southern Coal Producers Association from 1946 to 1960, together with the reports and minutes of that Association; (3) the deposition of Elmer C. Hill, Chief of the Fuels Procurement Branch of the TVA, who testified to the cancellation by West Kentucky Coal Company in 1965 of its long term coal sales agreements for the sale of coal to the TVA at the price of $2.90 per ton; and (4) stipulations entered in another lawsuit relating to the formation of the BCOA and including minutes of that Association and certain financial data. The Court has read and considered all of this evidence. Although voluminous, it is in very substantial measure cumulative to the proof offered upon the trial. The newly offered evidence offers no new theories of liability and presents no significant [fol. 15] alteration of the evidence as presented upon the trial. The Court can envision no injustice in declining to reopen the trial. In view of the very extensive

trial upon the issues, the substantially cumulative nature of the newly tendered proof, and the directions upon remand in this case, the Court is of the opinion that the motion to reopen the proof should be denied.

*Conclusions*

Having made a re-evaluation under the preponderance rule of the evidence as it relates to the various component allegations of the antitrust conspiracy herein sued upon, there remains to be accomplished a re-evaluation of the evidence when viewed as a whole and in its totality. Reviewing its former findings and conclusions in this regard and reviewing each in the light of the preponderance rule and in view of a restudy of the full record, the Court can find no justification for changing those findings or conclusions as set forth in 265 F. Supp. 388 at 431-435. The Court can only conclude that the evidence weighs no less equally in favor of a unilateral action on the part of the Union than it does in favor of conspiratorial action on the part of the Union.

The plaintiffs emphasize certain matters which they deem not to have been properly weighed or evaluated in the Court's original opinion. Among these are the totality of the UMW-BCOA negotiations, including changes in bargaining that occurred in 1950 and the PWC in 1958; the "price-wage squeeze" as evidenced in the UMW-West Kentucky Coal Company relationship, and the totality of the evidence as it relates to the ruinous conditions that developed in the late 1950's and early 1960's in the Southeastern Tennessee coal fields.

As regards the totality of the evidence and the plaintiffs' contentions of a UMW-BCOA antitrust conspiracy, [fol. 16] apart from what has been said in this or its

former opinion, the Court is of the opinion that the most that can be said without engaging in impermissible speculation is that the motives of the UMW and the motives of the BCOA do appear to have coincided. The Union was motivated to seek higher uniform wages and welfare benefits for its members. The BCOA was motivated to seek protection for its members from lower wage competition. A coincidence of motives does not of itself connote a Sherman Act conspiracy, nor does it make unilateral action to achieve these goals conspiratorial. Otherwise every employer and every union signing a collective bargaining agreement might well find themselves unavoidably exposed to an antitrust charge. A similar coincidence of motive can be found in almost every such situation, particularly where the industry is highly competitive and the union possesses any multi-employer bargaining strength. Moreover, in every competitive industry there are always marginal operators to whom any wage increase may be ruinous.

As regards the UMW-West Kentucky Coal Company relationship and activities, there can be no doubt but that the Union's financial and investment activities as they relate to that Company are deserving of the most critical censure. But whatever the Union's purpose or purposes were in making those investments, the evidence does not sustain the inference that they were for the purpose of an anti-competitive effect on the Southeastern Tennessee coal field or that they exemplified a union-industry antitrust conspiracy. As previously found by the Court, not only does the evidence fail to establish predatory pricing of coal upon the TVA market by the West Kentucky Coal Company, but there is an absence of any evidence of union participation in or responsibility for the pricing of coal by that Company.

[fol. 17] As regards the totality of the evidence of union activities in the Southeastern Tennessee coal field, these matters are believed to have been correctly stated and evaluated by the Court in its former opinion (265 F. Supp. 388 at 423-435).

While, as recognized by the Court in its former opinion, many factors contributed to the plight of the plaintiffs, including some of which they were themselves the author, there can be no question but that the Union's actions and activities during the period relevant to this lawsuit did in substantial measure occasion loss to the plaintiffs. However, injurious consequences, while an element of a Sherman Act violation, do not of themselves equate to such a violation. Rather, as stated by Justice White in the *Pennington* case (381 U.S. 657 at 664):

> "Unilaterally, and without agreement with any employer group to do so, a union may adopt a uniform wage policy and seek vigorously to implement it even though it may suspect that some employers cannot effectively compete if they are required to pay the wage scale demanded by the union. The union need not gear its wage demands to wages which the weakest units in the industry can afford to pay. Such union conduct is not alone sufficient evidence to maintain a union-employer conspiracy charge under the Sherman Act. There must be additional direct or indirect evidence of the conspiracy."

There is an absence of direct evidence of a conspiracy in this case. For the reasons stated in this and its former opinion, the Court is of the opinion that there is an insufficiency of indirect evidence to establish a conspiracy, even when viewed in light of the preponderance of the evidence rule. With such modifications and additions as

are herein set forth, the Court adopts its former opinion in this case.

An order will accordingly enter dismissing the lawsuit.

/s/ Frank W. Wilson
United States District Judge

# APPENDIX C

***Summary of the Evidence Pertaining to PWC and Implicit Understandings, Including Evidence Offered But Rejected by the Court Upon the Remand, Which Finds No Place in the District Court's Findings.***

The first opinion of the District Court does show the significance and importance of BCOA, particularly in the period from 1950 to 1958. But there were two other associations of major companies that were important in the period of the PWC, 1958 and later years. The testimony of UMW witness Hamilton Beebe in the old record in this case (pages 859a-885a of the appendix on the first appeal), dealt with the Illinois Coal Operators Association and Mr. Beebe testified from minutes of the Association.

The offered but rejected deposition of Mr. Joseph Moody, and the minutes which he testifies about deal with the Southern Coal Producers Association and also the proceedings of the Joint Industry Contract Committee which policed the PWC.

We submit that the Beebe and the Moody testimony establish with unquestionable reliability the circumstances set forth below which are not touched upon in any shape or form in the District Court's findings but which should be at the heart of the considerations governing the decision in this case.

***The Original Reluctance of the Two Regional Associations of Producers to Engage in the BCOA Framework of Bargaining with UMW.***

The Illinois Coal Operators Association was composed of several of the largest coal producing companies in the Illinois coal field. Its principal purpose before 1950 was to negotiate contracts with UMW for its members. It was a member of BCOA at the time of the latter's organization in 1950 and BCOA negotiated the 1951 and 1952 amendments to the National Contract for the Illinois Association members as well as for its other members. However the Illinois Association withdrew from BCOA in September of 1952 because its members felt that they had lost their freedom of action in BCOA and that they would be better off outside of BCOA than in it. The Illinois companies wanted "freedom of action" with respect to the terms of their contract. After withdrawing from BCOA, however, they found in later contract negotiation that they had no greater "freedom of action" but only had the right to accept or reject the contract negotiated by BCOA. Illinois Association members finally accepted the national contract amendments as negotiated by UMW and BCOA. This was so even though the members unanimously spoke out against and violently objected to, some of the terms of these contracts. (Testimony of Hamilton Beebe, appendix on the first appeal, pages 859a-885a).

The Southern Coal Producers Association, composed of a number of the largest coal producers in the South, was formed primarily for the purpose of coordinating and unifying the coal producers of the South into one compact organization which would have the strength to deal with UMW in making wage agreements and to compete with the Northern producers more favorably situated as to freight

rates, markets and with better natural conditions. The association fought vigorously, from its founding in 1941 until the mid 1950s, to avoid having to sign the same UMW contract signed by the Northern producers. The Southern producers contended that since their conditions were not as favorably disposed as those of the Northern producer they were unable to match their contract terms. The Southern Association members and officers expressed their concern at that time that the reason for pressing the contract terms upon them was to eliminate their competition because of the more favorable situation of the Northern producers. This attitude prevailed at least until the middle of the 1950s and during that period the Southern companies were in opposition to BCOA in this regard. Nevertheless, each time BCOA negotiated a contract amendment with UMW the same terms were imposed upon the Southern Coal producers who could do nothing but sign the 1951, 1952, 1955 and 1956 amendments. (Deposition of Joseph Moody, App. pp. 98a-140a).

*The Switch in the Policies of the Regional Associations; How the Protective Wage Clause of the 1958 Amendment Originated.*

The minutes of the Southern Coal Producers Association disclose the growth of competition by non-union or non-contract operations, and in 1955 and later years these minutes show the concern of the members of Southern Coal Producers Association who were signatories to the national contract with the UMW over the non-union or non-contract competition. The members of the Association discussed the possibility of acting against these non-union or non-contract operations, and Mr. Moody, then President of Southern Coal, explained to the membership that he frequently mentioned this problem to Mr. John Lewis, Presi-

dent of UMW, who claimed that he was spending hundreds of thousands of dollars on the problem of suppressing these operations which were competing with the signatory operators. The Southern Coal Association members also claimed that the mine workers were issuing "illegal contracts to operators" (i.e. contracts at terms below national contract terms) though this was denied by UMW, and the Southern Coal members demanded that conferences be had with UMW to make some effective headway against these practives. As always UMW responded "give us names and places." The president of Southern Coal testified that Mr. Lewis tried to do something about it but it was difficult to get specific information concerning it and what should be done about it. "It went from outright violence down to conversation but no one ever came up with a real plan that was effective," he said. In August, 1958 this problem was the principal item on the minutes of the Southern Coal Association and the members were demanding some sort of action. Mr. Moody stated "Mr. Lewis had expressed his concern and was open to constructive suggestions to better the situation. Mr. Moody said: 'I had a meeting with Mr. Lewis last week which lasted several hours and this was one of a series I have had commencing with your request two months ago that I discuss our problems with him.'" (Deposition of Mr. Moody and Minutes of Southern Coal Producers Association, App. pp. 142a-146a).

Mr. Moody, formerly president of Southern Coal and later President of BCOA, testified as to how the Protective Wage Clause came into being. He said:

> "I discussed it with Mr. Lewis. He was not very sanguine at the time, mainly because he did not see just how it could be done.

"Well I talked to him a couple of times more and said that I thought that it would give a central place of consideration of administration and would be helpful. And I mentioned to him this problem, that my people were becoming very adamant on their demand that something be done about the noncontract coal. And I don't know the time factors in here, but at another meeting it was talked about and there was one day I was over talking with Mr. Lewis and he showed me two papers which purported to be what we later called a protective wage clause—in other words a protection of the contract operators. One of them was in left field and one of them was in right field. I did take them and brought them up here—not to this place, but to our counsel .....(the Welly Hopkins of UMW and the Ed Fox of BCOA drafts) .....

"Well the basic approach of each was the same. It was to work out some method of closer cooperation by contract operators. However their approach to the thing was wide open and I have forgotten the difference on the thing. That is why I was hesitant about discussing the matter. That I brought it to counsel and asked them, one, for advice of counsel on the legality of such a thing and, two, would they redraft it to see if they could bring up something that was bright-eyed and shiny because Mr. Lewis said 'if you have any bright ideas let's see how smart you are.' My memory is that is what happened. And we brought them back and the Protective Wage Clause that was put into the contract was pretty much what was written in this law office including the licensing and so forth that went with it." (Deposition of Joseph Moody, App. pp. 148a-150a).

Mr. Moody also explained to his association of producers the theory behind the Protective Wage Clause as follows:

"In the promulgation of this contract over the years and especially in the past ten years, we have established a wage situation whereby most operators and industry as a whole, had to go to general mechanization of their operations because of the very high cost of labor. In so doing, in the case of the coal industry, there was a major decrease in the number of employees and according to the Bureau of Labor Statistics, there was a drop from 400,000 to less than 200,000.

"There has been a major increase in the number of pensioners. Many miners left the coal fields, but many have returned and many never left and so we find a surplus of labor throughout the coal fields. The law of supply and demand took over and we discovered that the labor price established by the contract, was not the price established by the number of miners available for work. The situation encouraged the establishment of mines, not under the union contract. This also presented the Union with a problem, as they found men who were members of the United Mine Workers, effectively opposing interference with their non-contract operations in order to hold their jobs. Therefore, the Union found it was unable to carry out major organizing campaigns. Lastly the coal market was rather seriously weakened as far as price was concerned as there was a premium on noncontract, low priced coal." (Deposition of Joseph Moody and Minutes of Southern Coal Producers Association, App. pp. 152a-154a).

Some time before the PWC was signed Joseph Moody as head of Southern Coal Producers Association was con-

ferring with Mr. Hamilton Beebe of the Illinois Coal Operators Association about the terms of the PWC. (Testimony of Hamilton Beebe, appendix on first appeal Case No. 17,878, page 883a, and Deposition of Joseph Moody, App. pp. 156a-161a).

At the same time Mr. Fox of BCOA and Mr. Kennedy of UMW were exchanging drafts of a proposed protective wage clause. Mr. Hopkins, senior counsel of UMW, testified that the operators demanded Paragraph "A" of the PWC. (Testimony of Mr. Hopkins, appendix on first appeal, Case No. 17,878 pages 1025a-6a, 1029a).

The men who became members of the Joint Industry Contract Committee (JICC) under the PWC in 1959 were these same men, that is Messrs. Fox, Moody and Beebe, for the coal operators and the International officers of the Union for UMW (App. pp. 22a-23a).

*The History of the Enforcement of PWC. Contest of PWC under the Labor Law. Substitution of the "Eighty Cent Welfare Clause."*

The minutes of the JICC, whose members were the men who formulated the language of the clause, show that the District Presidents of UMW were required to send in lists to the JICC certifying that each list was a "complete list of all operators and mines engaged in the production of bituminous coal within the District ..... and whose operations are under contract to the said union." These lists were added to from time to time, as new contracts were made (App. pp. 28a-29a, 45a, 51a).

The JICC sent out demands to all of these companies that they send back certification of compliance in the prescribed form—that is, that they were paying the national

contract scale and welfare royalty and had "complied fully with the other provisions of the said national agreement." No consideration or mention at all was given to any idea that UMW or any of its agents could make some different contract than the national contract (App. pp. 52a-77a).

Hundreds of companies did not send back the certification, and, after a second letter of warning, formal determinations were made and recorded of violation of the PWC on the part of 1328 coal operators across the country, the determination being that every such producer "has violated the Protective Wage Clause" of the 1950 contract as amended, and:

> " ... has failed and refused to comply with its obligation under such clause to certify in writing to the Committee that it is in full compliance with all of the terms and conditions of such agreement" (App. pp. 52a-77a).

The Landrum-Griffen Act with its "hot-cargo" or secondary-boycott provisions was passed by Congress in September, 1959. The JICC had been at work several months and was getting its enforcement program into high gear. But the new act cast doubt upon the legality of the boycott contained in Paragraph "B". Because of this, JICC passed a resolution on November 4, 1959, suspending enforcement of the boycott pending clarification of the legal situation (App. pp. 78a-81a).

One of the two main aspects of the resolution of the JICC suspending its formal activities in enforcing the boycott under Paragraph "B" of PWC, was an attempt to afford operators with a defense to treble damage antitrust cases based on the boycott called for by Paragraph "B". Thus Mr. Lane, Attorney for both Southern Coal and the

JICC reported to the Southern Coal membership on November 9, 1959, about the suspension resolution as follows:

> "2. In the event signatory operators are confronted with the possibility of lawsuits—including antitrust treble damage suits—or other disputes or issues pertaining to the subject matter of the Protective Wage Clause, they are now possessed of an official document with important defensive aspects and which in numerous cases may well be importantly instrumental in protecting the position of signatory operators" (App. p. 168a).

There was no intention of suspending the parts of PWC about which plaintiffs complain in this case—Paragraph "A" and other parts which put restraints on the union's bargaining policy. Thus, Mr. Moody, one of the members of the JICC, reported back to the Southern Coal meeting of November 9, 1959 about the suspension resolution:

> "(Mr. Moody read the Resolution) Mr. Moody called attention to the fact that one of the discussions that took place was that the Protective Wage Clause, hereby made inactive, has two sections, Section A and B. Mr. Moody said that Section A (the Union obligation) was discussed; that Section A does not appear to be affected by the new law as far as could be determined at this time; and that if any ruling under Section A is desired, action can be brought before the committee and the committee will consider it. In other words it is still possible to process a Section A matter and the members of the committee will be available for that consideration." (Parenthetical matter as well as the rest of the quote is part of the minutes of Southern Coal.) (App. p. 166a).

A subsequent special meeting of the JICC July 27, 1960 continued this policy, the minutes of the Joint Committee stating:

"The Chairman (Mr. John L. Lewis) stated that the principal purpose in calling the special meeting of the Committee was to further consider the resolution passed by the Committee on November 4, 1959. There was a general discussion by all members of the Committee as to the rights, duties, and obligations of the Committee under the Protective Wage Clause with due regard to the congressional action taken in September, 1959. It was pointed out by counsel present that certain provisions of the Protective Wage Clause were not affected by the Labor-Management Reporting and Disclosure Act of 1959 and that it was not only the right but the duty of the Committee to continue to function as an instrumentality for the advancement of the interest of the contracting parties to the National Bituminous Coal Wage Agreement" (App. p. 84a).

The JICC met occasionally until 1964 (App. p. 94a).

Ultimately JICC authorized attorneys to represent the members in any proceeding challenging PWC and a NLRB case was filed. It was founded on Landrum-Griffen and had nothing to do with antitrust law (App. p. 97a; *Lewis, et al v. NLRB*, 5-CE-6; 350 F.2d 801).

It is evident the interruption in the work of the committee by Landrum-Griffen was having its effect on the UMW's organizing effort. On March 12, 1964, Mr. Fox of BCOA wrote the president of Island Creek Coal Company, largest southern company in Southern Coal:

"Dear Jim: Thank you very kindly for your letter of March 10, 1964. The matter of the competition of those in the bituminous industry who are non-signators to the National Bituminous Coal Wage Agreement and thereby not obligated to pay a higher wage scale and

the 40-cent royalty has been discussed on many occasions with the United Mine Workers.

"I hope that my presentations and the presentations of others in the industry to the officials of the United Mine Workers of America will make them appreciate the seriousness of this situation, not only to the coal companies, but to the United Mine Workers of America as well.

"It is most difficult to meet any demands made by the Mine Workers when there is a lack of opportunity to increase the price of coal to meet these demands" (App. pp. 178a-179a).

It was only a few days after the foregoing letter that another provision against non-union or non-complying coal operators was inserted by UMW-BCOA in the 1964 Amendment to the national contract in the month following the above quoted letter of Mr. Fox. This was the "Eighty Cent Welfare Clause." This provisions reads:

"During the life of this agreement there shall be paid into such Fund by each Operator signatory hereto the sum of forth cents (40¢) per ton of two thousand (2,000) pounds on each ton of bituminous coal produced by such Operator for use or for sale. On all bituminous coal procured or acquired by any signatory Operator for use or for sale, i.e., all bituminous coal other than that produced by such signatory Operator) there shall during the life of this Agreement, be paid into such Fund by each such Operator signatory hereto or by any subsidiary or affiliate of such Operator signatory hereto the sum of eighty cents (80¢) per ton of two thousand (2,000) pounds on each ton of such bituminous coal so procured or acquired on which the aforesaid sum of forty cents (40¢) per ton had not been paid into said Fund prior to such procurement or acquisition."

# APPENDIX D

## STATUTES INVOLVED

15 USCA:

§ 1. TRUSTS, ETC., IN RESTRAINT OF TRADE ILLEGAL; EXCEPTION OF RESALE PRICE AGREEMENTS; PENALTY

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided*, That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers,

or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282.

§ 2. MONOPOLIZING TRADE A MISDEMEANOR; PENALTY

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, § 2, 26 Stat. 209; July 7, 1955, c. 281, 69 Stat. 282.

§ 15. SUITS BY PERSONS INJURED; AMOUNT OF RECOVERY

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in

controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. Oct. 15, 1914, c. 323, §4, 38 Stat. 73.

§ 17. ANTITRUST LAWS NOT APPLICABLE TO LABOR ORGANIZATIONS

The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraints of trade, under the antitrust laws. Oct. 15, 1914, c. 323, §6, 38 Stat. 731.

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29 USCA Sec. 52 (Sec. 20 of the Clayton Act):

§ 52: STATUTORY RESTRICTION OF INJUNCTIVE RELIEF

No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for

which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States. Oct. 15, 1914, c. 323, § 20, 38 Stat. 738.

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## 29 USCA Sec. 102 (Sec. 2 of the Norris-LaGuardia Act):

§ 102: PUBLIC POLICY IN LABOR MATTERS DECLARED

In the interpretation of this chapter and in determining the jurisdiction and authority of the courts of the United

States, as such jurisdiction and authority are defined and limited in this chapter, the public policy of the United States is declared as follows:

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of and limitations upon the jurisdiction and authority of the courts of the United States are enacted. Mar. 23, 1932, c. 90, § 2, 47 Stat. 70.

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## 29 USCA Sec. 104 (Sec. 4 of the Norris-LaGuardia Act):

### § 104: ENUMERATION OF SPECIFIC ACTS NOT SUBJECT TO RESTRAINING ORDERS OR INJUNCTIONS

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent

injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 103 of this title;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title. Mar. 23, 1932, c. 90, §4, 4 Stat. 70.

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## 29 USCA Sec. 106 (Sec. 6 of the Norris-La-Guardia Act):

§ 106: RESPONSIBILITY OF OFFICERS AND MEMBERS OF ASSOCIATIONS OR THEIR ORGANIZATIONS FOR UNLAWFUL ACTS OF INDIVIDUAL OFFICERS, MEMBERS, AND AGENTS

No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof. Mar. 23, 1932, c. 90, §6, 47 Stat. 71.

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## Labor Management Relations Act, 1947 (29 USCA):

§ 141: SHORT TITLE; CONGRESSIONAL DECLARATION OF PURPOSE AND POLICY

(a) This chapter may be cited as the "Labor Management Relations Act, 1947."

(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this chapter, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce. June 23, 1947, 3:17 p.m., E.D.T., c. 120, § 1, 61 Stat. 136.

§ 151: FINDINGS AND DECLARATION OF POLICY

The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) oc-

curring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms

of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection. July 5, 1935, c. 372, § 1, 49 Stat. 449; June 23, 1947, 3:17 p.m., E.D.T., c. 120, Title I, § 101, 61 Stat. 136.

## § 157. RIGHT OF EMPLOYEES AS TO ORGANIZATION, COLLECTIVE BARGAINING, ETC.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title. July 5, 1935, c. 372, § 7, 49 Stat. 452; June 23, 1947, 3:17 p.m., E.D.T., c. 120, Title I, § 101, 61 Stat. 140.

## § 158. UNFAIR LABOR PRACTICES

* * *

(b) It shall be an unfair labor practice for a labor organization or its agents —

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances:

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title;

* * *

July 5, 1935, c. 372, § 8, 49 Stat. 452; June 23, 1947, 3:17 p.m., E.D.T., c. 120, Title I, § 101, 61 Stat. 140; Oct. 22, 1951, c. 534, § 1(b), 65 Stat. 601.

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in a strike

or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is ——

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another

trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

* * *

(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: *Provided*, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further*, That for the purposes of this subsection and subsection (b)(4)(B) of this section the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further*, That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing ex-

ception. As amended September 14, 1959; Pub. L. 86-257, Sec. 704(b).

* * *

§ 185. SUITS BY AND AGAINST LABOR ORGANIZATIONS —VENUE, AMOUNT, AND CITIZENSHIP

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

* * *

(b) ... Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States .... June 23, 1947, 3:17 p.m., E.D.T., c. 120, Title III, § 301, 61 Stat. 156.

Nos. 72-1926-27

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

FILE
AUG 2 0 197
JAMES A. HIGGINS

GEORGE RAMSEY, et al.,
Plaintiffs-Appellants,

vs.

THE UNITED MINE WORKERS OF AMERICA,
Defendant-Appellee.

TENNESSEE PRODUCTS AND CHEMICAL CORP.,
Plaintiff-Appellant,

vs.

THE UNITED MINE WORKERS OF AMERICA,
Defendant-Appellee.

ORDER

Before: WEICK, EDWARDS and LIVELY, Circuit Judges.

On receipt and consideration of a petition suggesting rehearing in banc and moving rehearing; and

No active judge on the court having proposed rehearing in banc and the motion for rehearing having been referred to the original panel which heard the case, with Judge Lively designated to take the place of Judge Kent, now deceased; and

Having noted that the motion for rehearing raises no substantial issues which were not considered by the

ception. As amended September 14, 1959; Pub. L. 86-257, Sec. 704(b).

* * *

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(b) ... Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States .... June 23, 1947, 3:17 p.m., E.D.T., c. 120, Title III, § 301, 61 Stat. 156.

court in its original consideration of the case,

Said motion for rehearing is hereby denied.

Judge Weick would grant the petition for rehearing and reverse the judgment of the District Court for reasons set forth in his dissenting opinion.

Entered by order of the Court.

James A. Higgins
Clerk